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THE LAW

OF

CHARITABLE BEQUESTS.

WITH AN ACCOUNT

OF

THE MORTMAIN AND CHARITABLE USES ACT,

1888.

BY

AMHERST D. TYSSEN, D.C.L.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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INTRODUCTION.

I OFFER this book to the public in the hopes that the labour, to which I have devoted my spare hours for some considerable time, may prove a saving of labour to others, who may have to advise or decide upon any of the questions treated of in this book. The book is confined to charitable testamentary dispositions, and will be seen to be arranged on the following scheme :—

The first chapter gives a history of the subject, and the next two chapters on Devises to Corporations, and the Custom of London discuss two points necessary to be grasped in order to understand the origin of many charitable gifts.

The fourth chapter gives the definition of charitable gifts contained in the Statute of Elizabeth, and also mentions the curious fictions which in former times were based upon that statute.

Chapters 5 to 23 shew what gifts have been held to be charitable, and what gifts resembling them are private gifts or void gifts.

Chapters 24 to 29 deal with questions arising under the Georgian Mortmain Act.

Chapters 30 to 38 discuss a number of questions arising under charitable testamentary dispositions.

The 39th chapter is devoted to Procedure.

The 40th and 41st chapters relate to the Charitable Trusts

Acts; and the 42nd deals with the Mortmain and Charitable Uses Act of the present year, 1888.

On each point which is discussed in this book I have endeavoured to find all the authorities bearing upon it, and arrange them in chronological order; and then draw up a short statement of the principles to be deduced from them, mentioning in each clause the cases which support the proposition there laid down. The date will be found appended to each case, and by that means the case may be readily found in the chronological digest which follows in each chapter. I have endeavoured at the same time to point out what cases are overruled, and what cases, not avowedly overruled, are inconsistent with later authorities.

It remains for me to mention the principal books on the subject of charities, to which I have had recourse in preparing this work.

Herne on Charitable Uses, published in 1660, seems to have been the first specimen of literature upon this subject.

Duke on Charitable Uses followed in 1676, and remained for long the standard work upon charities. Bridgman's edition of this work appeared in 1805. It is usual to cite it in the following way: Duke 45, B. 630, meaning thereby to refer to the 45th page of Duke's original work, and the 630th of Bridgman's edition. Both Duke and Herne include a number of reports of charitable cases, and these are still referred to as authorities.

Highmore on Mortmain was published before Bridgman's work, and reached a second edition in 1809. It also includes some reports of cases not elsewhere to be found. It devotes much attention to the procedure under the Statute of Elizabeth, which had fallen into disuse before the last-mentioned date.

Shelford on Mortmain, published in 1836, is a first-class book, like other books by the same author. It covers the whole field of gifts to charities and corporations and the administration of

such gifts. Most of the Acts of Parliament relating to the subject will be found set out in the Appendix.

Boyle on Charities, published in 1837, is a carefully written book, covering only a small field. The book is difficult to procure, and I could have wished to be able to examine it more thoroughly than can be done in a general library.

Tudor on Charities, of which the first edition appeared in 1854, and the second in 1862, is an excellent little book, giving a succinct account of the whole law upon the subject up to the date of its publication.

Cooke and Harwood's Charitable Trusts Acts, 2nd ed. 1867, is a useful collection of statutes relating to charities, but deficient in respect of indexing and arrangement.

Whiteford on Charities, 1878, is a short statement of some of the points relating to the law of charities, on less than 100 small pages.

Very instructive chapters on the law of charities may also be found in Roper on Legacies, Grant on Corporations, Jarman on Wills, Story on Equity Jurisprudence, and Lewin on Trusts, and a good summary of the principal points is given in Theobald on Wills.

The latest book on the subject is Mitcheson on the Charity Commission Acts, which deals with the jurisdiction of the Charity Commissioners, and all points arising before them. This was published in 1887, and covers just that portion of the subject which does not come within the scope of the present work.

ADDENDA.

While this book has been passing through the press, reports have been published of several cases, which should be added to those cited in the text.

The case of *In re Palatine Estate Charity*, mentioned on p. 91, with a reference to p. 458 of the *Solicitor's Journal*, and p. 111 of the *Weekly Notes* of the current year, has been reported in full in 39 Ch. D. 60. The full report adds a few points to the prior notice, which will be found mentioned on p. 511.

The case of *In re St. Stephen, Coleman Street, and St. Mary the Virgin, Aldermanbury* (39 Ch. D. 492) (July, 1888, Kay, J.) should be added on p. 99 to the list of cases on trusts for parishes. The decision was to the effect that an advowson vested in trustees on trust to present such vicar as might be chosen by the parishioners, and a vicarage house provided under a bequest in an old will, were charitable property, and, being in London, were subject to the City of London Parochial Charities Act, 1883. Two petitions for a declaration to the contrary, which were presented under s. 10 of that Act, were dismissed with costs; and leave to appeal was refused.

Two further clauses should be added to the principles stated on pp. 223–226 respecting gifts to societies, to the following effect:—

(1) If a so-called society is worked entirely by one individual without any organization for carrying on its operations after his death, it expires on his death, and a legacy, bequeathed by him to it, lapses.

(2) If a testator gives legacies to two independent societies, and the two societies combine before his death, the amalgamated society is entitled to both legacies.

These points are established by *In re Jay, Purday* v. *Johnson*, before Chitty, J., Dec. 7, 1888, reported in the *Times* of the following day.

A testatrix bequeathed as follows: "I give to the Rev. C. £1000 upon trust to apply the same for the benefit of the Society for Suppressing Cruelty by United Prayer, of which society I have for some time been the treasurer, and to be applied by him in such way as he may consider most for the benefit of the said society and for accomplishing the purposes and objects thereof." It appeared the testatrix had had some cards printed, bearing a prayer on one side, and the title of "The Society for United Prayer for Protection of Animals from Cruelty" on the other, together with three so-called rules, namely, that each member should (1) purchase a card, price 2*d.* to the rich and 1*d.* to the

poor, and (2) use the prayer, and (3) that it was hoped that each member would try to get more members and circulate pamphlets. The testatrix paid all expenses and received the proceeds of the cards, and rendered no accounts, and had only kept a few incomplete memoranda of accounts. She had also published some stories inculcating kindness to animals, but for a few years before her death she had been ill, and nothing had been done to further the object of the cards.

Chitty, J., held that the object of promoting a cause by prayer was not a charity, and that viewed as a gift to a voluntary association for an innocent, but not charitable, purpose, the gift failed by the death of the testatrix. He considered that there was no real society, but merely an individual carrying on a certain work under the name of a society, just as individuals in trade often call themselves a trading company.

The testatrix also gave two legacies of £200 each to two anti-vivisection societies. The two amalgamated.

Chitty, J., held that the amalgamated society was entitled to both legacies, and compared the case to a bequest of legacies to a man and woman who afterwards married.

The point that a society for accomplishing an object by prayer is not a charity should be noted on p. 65. It would seem to be practically a religious order not bound by monastic vows.

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THE LAW

OF

CHARITABLE BEQUESTS.

CHAPTER I.

History of the Subject.

Gifts to corporations.

As uses and trusts were altogether unknown to the Common Law, and only recognised by the Court of Chancery, it necessarily follows that charitable trusts did not exist before the Courts of Common Law were supplemented by the Court of Chancery. But something very like them did exist. That is to say, there were a number of religious houses and guilds, and there was the parson of every parish, who were all persons having perpetual successors, with property which devolved upon them, and there were certain duties of a charitable nature which these persons had to perform. Each of these was, in effect, a corporation. It is now settled law that a corporation cannot be constituted except by a charter from the Crown, or an Act of Parliament, or by complying with the forms prescribed by some Act of Parliament. But the parson of every parish was recognized as a corporation at Common Law, without shewing by what authority the parish was originally constituted. And it seems that many voluntary associations were regarded as corporations, although they had no title to the name, and being so recognised they were called corporations by prescription. The

form, then, which charity took in early times consisted of gifts of land to these corporations. Most of these corporations were of an ecclesiastical nature, and held their lands by the tenure called frankalmoigne, under which they rendered no service to any superior lord. The Crown, therefore, and any intermediate lords, lost the services due in respect of all land thus alienated; and the land was said to come to a dead hand, or in Latin a *mortua manus*. The English word "mortmain" was coined to represent this condition. The Crown and the lords naturally objected to the putting of land into mortmain.

There are two clauses in Magna Charta having some bearing on this practice. One, s. 32, forbids any freeman to alienate so much of his land as will render the residue insufficient to secure the services due to the lord: "Nullus liber homo det de cetero amplius alicui, vel vendat de terrâ suâ, quam ut de residuo terræ suæ sufficienter possit fieri domino feodi servitium ei debitum, quod pertinet ad feodum illud."

The other, s. 36, forbids a dodge, resembling the Jewish vow of Raca, whereby a tenant gave land to a religious house, and thereby got it discharged from all services, and then received it back again: "Nec liceat de cetero alicui dare terram suam domui religiosæ ita, quod illam resumat de eâdem domo tenendam. Nec liceat alicui domui religiosæ terram alicujus sic accipere, quod tradat illam illi, a quo eam recepit tenendam. Si quis autem de cetero terram suam alicui domui religiosæ sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino illius feodi incurratur."

The Plantagenet Mortmain Acts.

These enactments appear to have been followed, some time before the year 1279, by an Act of Parliament, which has been lost, for the Statute de Religiosis, passed in that year (7 Edw. 1, c. 2), begins by reciting: "Whereas it was of late provided that men of religion should not enter into the fees of any without the licence and will of the superior lords of whom those fees are immediately held," and adds that they have nevertheless done so, and then contains an enactment, of which we will give the original words, and a correct translation:—

"Quod nullus religiosus aut alius quicunque terras aut tenementa aliqua emere vel vendere, aut sub colore donationis aut termini vel alterius tituli cujuscunque ab aliquo recipere, aut alio quovis modo arte vel ingenio sibi appropriare presumat, sub forisfacturâ eorumdem, per quod ad manum mortuam terræ et tenementa hujusmodi deveniant quoquo modo."

"That no religious person, or any one else, presume, under pain of forfeiture thereof, to buy or sell any lands or tenements, or to receive them from any one under colour of any gift or term or other title whatever, or by any other means to appropriate them to himself by any art or device, whereby such lands or tenements may by any means get into mortmain."

The statute then proceeds to give the lord of the fee the right to enter on any such lands; and, if he omits to do so within a year, then the like right to the next lord; with power also for the Crown to seize the lands at any time after a year. Numerous evasions were attempted of this statute, and the statutes 13 Edw. 1, c. 32, and 18 Edw. 3, stat. 3, c. 3, were passed to defeat such evasions; and in 1391 or 1392 the statute 15 Rich. 2, c. 5, was passed. This Act recites that evasions of the former Act had been effected on the theory of making churchyards and consecrating them, and declares all such transactions to be within the former statute; and it also directs all those that be possessed of lands by feoffment or any other means "to the use" of religious people, to mortize such lands (*i.e.* convey them to the religious people so as to bring them within the former statute). It also extends the former statute to all lands purchased to the use of guilds or fraternities, and concludes as follows:—

"And moreover, it is assented, because mayors, bailiffs and commons of cities, boroughs and other towns, which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion, that from henceforth they shall not purchase to them and to their commonalty or office,

under the penalty contained in the said statute de religiosis; and concerning that which others are possessed of or shall hereafter purchase to their use, and of which they are receiving or shall receive the profits, be it done in like manner as before is said concerning religious persons."

Uses and trusts invented.

It may well be imagined that the above-mentioned Acts put an effectual stop on gifts of land to corporations; but a new method of making charitable gifts was soon invented. It will be seen that in the interval between the two above-mentioned Acts the system had been adopted of making gifts of land to individuals to the use of the religious houses, under which gifts the religious houses took the profits. It was this system which was eventually turned to account to enable charitable gifts to be made. But in the history of our law our attention is not called to it till several centuries later. We first find that the system of uses was adopted by private individuals to avoid the feudal incidents of tenure. A temporary blow was given to that system in Henry VIII.'s reign by the Statute of Uses, which conferred the legal estate on the *cestui que use*, *i.e.* the person who had the use of the land. But the effect of the statute was nullified by a decision that the legal estate was only conferred on the first person who was named to have the use, and if he was further directed to pass on the beneficial interest to somebody else, the legal estate did not go with it. The Court of Chancery, however, compelled the legal owner to allow the beneficial interest to go as directed; and the system of uses was thus revived in an improved form under the name of trusts.

Now gifts of the land itself, or the legal estate, could only be made to individuals for certain estates and interests known to the law. In the course of time a rule was hammered out that a remainder to the unborn child of an unborn person was void, at least when preceded by a life estate in the unborn parent, and probably in all cases. Then when the Court of Chancery had to deal with uses and trusts for individuals, it followed the legal rule in the case of equitable estates in land corresponding

to legal remainders, and in other cases it adopted an analogous rule, namely, that every use or trust must be so limited as necessarily to vest within a life or lives in being and twenty-one years, allowing only the further period of gestation of the parties entitled, where such gestation actually caused this limit to be exceeded.

Perpetual charitable trusts allowed.

But uses and trusts of land were not necessarily confined to gifts to determinate individuals. It was possible to express to give land to trustees on trust to apply the rents and profits every year for ever, to say masses for the donor's soul, to keep his tomb in repair, to teach particular religious opinions, to distribute food to the poor, to keep up a school or a hospital, and for a multitude of other purposes. One by one the question of the validity of such trusts was brought before the Court of Chancery. In deciding these questions the Court put aside altogether the rules of remoteness and perpetuities. It considered only this: Having regard to all legislative enactments, and general legal principles, is it or is it not for the public benefit that property should be devoted for ever to fulfilling the purpose named? If the Court considered that it was not for public benefit, it held the trust altogether void. Thus it held void, trusts to say masses for the donor's soul, to keep in repair a tomb outside of a church, or to teach religious opinions on which penalties were inflicted by statute. If the Court considered that it was for the public benefit that the property in question should be devoted for ever to fulfilling the purpose named, it held the purpose good. Thus it held good all trusts for promoting the established religion, also all trusts for keeping up schools and hospitals, and many other trusts. These trusts, for purposes which the law considers it for the public benefit to perpetuate for ever, are called charitable trusts. This is the only general definition which can be given of the word charity. If we want a more precise determination of what is, and what is not, a charity, we must resort to a simple enumeration of the purposes which have been included under the term. An early statute, namely, 43 Eliz. c. 4, contains an enumeration of the principal chari-

table purposes then in vogue, and the list there given is taken as a guide in deciding whether any purpose is charitable or not. But we shall see in the course of our work that many purposes have been held to be charitable which are not mentioned in this statutory list.

We have hitherto spoken only of land, but gifts of other species of property were subjected to the same rules of perpetuities, as trusts of land, and to the same rules, as to void purposes and charitable purposes; although land alone was affected by the Plantagenet Mortmain Acts which have been mentioned above, and land was and is subject to many rules of law which do not affect other kinds of property.

Land made deviseable.

It is, no doubt, known to our readers that a power of devising land by will was just practically acquired by means of the system of uses; and though the Statute of Uses (27 Hen. 8, c. 10, A.D. 1535) destroyed it for a moment, another statute, passed some five years later (32 Hen. 8, c. 1), and amended by an explanatory Act (34 Hen. 8, c. 5), openly authorized devises of socage land, and two-thirds of knight-service land other than devises to corporations. More than a century later, on the restoration of Charles II. in 1660, all tenures were turned into socage tenure (12 Car. 2, c. 24); and all land thus became deviseable. Gifts of land to private trustees for charitable purposes then became common, and many of the old evils attendant on alienations in mortmain began to be felt again.

The Georgian Mortmain Act, 1736.

At length the Georgian Mortmain Act (9 Geo. 2, c. 36) was passed, enacting that from and after June 24, 1736, no land, charges on land, interests in land, or money to be laid out in land, should be given for charitable purposes, except in the manner and with the formalities required by the Act. The manner and form thus appointed required for a gift of any property other than stock in the funds, a deed attested by two witnesses, enrolled in the Chancery Enrolment Office within six months, and reserving no benefit for the donor; and the Act further provided that, if the deed was a deed of gift and not a conveyance in a sale for full value, it should be made void by

the death of the donor within twelve months after its execution. For a gift of stock in the funds, it required a transfer in the Bank books at least six months before the donor's death.

Impure personalty.

It will be observed that this Act applies not only to land but to personal estate, which consists either of a charge upon land, an interest in land, or money to be laid out in land. Such personal estate cannot be left by will for charitable purposes. All such personal estate is called impure personalty. On the other hand, all personal estate which does not come under any of these categories is called pure personalty, and may be left by will for charitable purposes, provided that such purposes do not necessarily involve the acquisition of land, or, in technical words, tends to mortize land.

Excepted charities.

Certain charities are excepted from the operation of the Act; a few others have also been excepted by subsequent Acts of Parliament; and the general provisions of the Act have been modified in several particulars.

Modifications of the Plantagenet Acts.

We ought to add here that the provisions of the old Plantagenet Mortmain Acts have been considerably modified in the course of centuries, and some corporations have been excepted from them altogether, and many others have received licences to hold a limited amount of land. The rights of the intermediate lords have been abridged by giving to the Crown alone the right to grant a licence to any corporation to hold land (7 & 8 Will. 3, c. 37). Incorporated charities are empowered to invest money in land with the consent of the Charity Commissioners, without any further licence (18 & 19 Vict. c. 124, s. 35), and other corporations holding money for any public or charitable purpose are allowed to invest it on real security (33 & 34 Vict. c. 34). Trading companies may hold land (25 & 26 Vict. c. 89, s. 18), and non-trading companies may hold two acres without any licence, and further land if licensed thereto by the Board of Trade (25 & 26 Vict. c. 89, s. 21). The trustees of any charity are also able to procure incorporation from the Charity Commissioners (35 & 36 Vict. c. 24). When land, however, is purchased by a charitable corporation under

these Acts, the forms required by the Georgian Mortmain Act must be observed.

Custom of the City of London.

A few more points in the sketch above given ought to be filled in at once. It was an ancient custom of the city of London that its citizens had the right of devising land within the City to corporations without any licence from the Crown. This right remained, as will be shewn in a subsequent chapter, notwithstanding the Plantagenet Mortmain Acts, and was freely exercised. Such devises were made sometimes so as to give the land to some City company as part of its corporate property, and sometimes so as to give it subject to some charitable trusts affecting the whole or part of the income produced by the property. These devises have led to litigation in a great number of cases, the question in dispute being the application of the income of the property after the rents of land in the City had very much increased. The power to devise land in the City to civil, *i.e.* not charitable, corporations, so as to make it part of the corporate property, appears still to exist. There has been no Act of Parliament authorizing the Crown to seize such land, or rendering such a devise void. But the power to devise land in the City to corporations for charitable purposes is clearly controlled by the Georgian Mortmain Act (9 Geo. II., c. 36). There does not appear to be any decision to this effect, but that circumstance shews that the Act has been so understood, and that no attempt to raise a contrary contention has ever been made.

Devises to corporations.

We ought to add a few further words on the subject of devises to corporations. The Plantagenet Mortmain Acts did not render a gift of land to a corporation void, but gave the Crown power to seize it. But the Statute of Wills in 1540 (32 Hen. 8, c. 1), as explained by the statute 34 Hen. 8, c. 4, excepted devises to corporations from the devises thereby authorized. The result was that a devise of land to a corporation was void, and the land descended on the heir. Nevertheless, devises of land to corporations upon charitable trusts were held good; and we shall shew in a separate chapter that the result of the cases appears to be that they were held good in equity on the ground

that a trust shall not fail for default of a trustee; and that they were held to pass the legal estate on the ground that the statute 43 Eliz., c. 4, repealed the exception in the Statute of Wills so far as regards devises to corporations upon charitable trusts.

The present Wills Act (7 Will. 4 & 1 Vict. c. 26, Jan. 1, 1838), authorizes devises in general terms, so that a devise to a corporation appears to be valid, but renders the land forfeitable to the Crown; but a devise on a charitable trust is rendered void by the Georgian Mortmain Act, unless to a charity excepted from that Act.

Mortmain Act, 1888.

The whole law on the subject of this chapter is now summed up in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), which repeals the old Acts of Parliament, and re-enacts the effect of them in a clear and concise form, and introduces a few slight amendments. This Act will be set out in full and discussed in a later chapter, and its effect will be noticed from time to time in the course of this book.

CHAPTER II.

On Devises to Corporations.

Devises to corporations on charitable trusts.

We have already mentioned that the Plantagenet Mortmain Acts did not render a gift of land to a corporation void, but only gave the Crown power to seize it. But the Statute of Wills in 1540 (32 Hen. 8, c. 1) as explained by the statute 34 Hen. 8, c. 4, excepted devises to corporations from the devises thereby authorized. The result was that a devise to a corporation under that Act was void, and the land descended on the testator's heir-at-law. There was, however, and there still is, an equitable maxim, that a trust should not fail through any defect in the trustee. From this it followed that, if land was devised to a corporation upon a trust, the testator's heir took it likewise subject to the trust; and the *cestui que trust* could apply to the Court of Chancery and so compel the performance of the trust: see *Sonley* v. *Clockmakers' Company* (1 Bro. C. C. 81); and the case in 1570 mentioned in *A.-G.* v. *The Master of Brentwood School* (1 M. & K. 376). It was natural, then, that an heir-at-law should not care to claim land which was affected by a trust exhausting the whole income produced by it: and it seems to have happened that in many cases, after the statutes 32 Hen. 8, c. 1, and 34 Hen. 8, c. 4, land was devised to corporations upon charitable trusts, and the corporations were allowed to take possession of the land without any molestation by either the heir-at-law or the Crown.

This practice has been confirmed by legal decision, and the validity of a devise to a corporation for a charitable purpose prior to the Georgian Mortmain Act may be looked upon as settled. That is to say, it may be looked upon as settled that

the Court of Chancery would both enforce the trust, and commit the administration of it to the corporation named, and protect the corporation in the possession of the property, and permit it to sue in respect thereof. The bulk of the authorities also support the proposition that the devise was good at law after the statute 43 Eliz. c. 4, and that the corporation took the legal estate; and this was so held explicitly in *Benet Coll. Camb.* v. *Bishop of London* (Jan. 1778) (2 W. Bl. 1182). This decision was avowedly based on the ground that such a devise was rendered good at law by the statute 43 Eliz. c. 4. We shall mention that statute more fully in a later chapter, and it will be seen that it was a pure legal fiction to base such a decision upon it, and that other decisions were based upon it which were equally unwarranted. Legal fictions were, however, in vogue amongst us some centuries ago, though they have fallen out of favour now. Later judges have therefore condemned the forced and unnatural construction which was placed upon that statute: Lord Northington in *A.-G.* v. *Bradley* (1 Eden. 482); Lord Eldon in *A.-G.* v. *Skinners' Company* (2 Russ. 420); Lord Redesdale in *A.-G.* v. *Brown* (1 Bligh, N. S. 347); and Lord St. Leonards in *Incorporated Society* v. *Richards* (1 Dr. & War. 258) (1841). Moreover, the last-mentioned case of *Incorporated Society* v. *Richards* was a case in Ireland, where the statute 43 Eliz., c. 4, does not apply, and Lord St. Leonards, in his judgment, referred the validity of a charitable devise to a corporation to an inherent jurisdiction of the Court of Chancery to establish defective gifts for charitable purposes, and referred to *Symons' Case*, Duke B. 163 (1582), and *A.-G.* v. *Master of Brentwood School* (1 M. & K. 390), and he held therefore that such a devise was good in equity in Ireland as well as England. Such a jurisdiction could only have enabled the Court of Chancery to establish the gift in equity, and could not have justified a decision that the devise gave the legal estate to the corporation. Accordingly Lord St. Leonards threw doubts on the case of *Benet Coll. Camb.* v. *Bishop of London* (2 W. Bl. 1182), but at the same time he admitted that it was too late to overrule the

They took the legal estate.

decisions, which he regarded as being based on a forced and unnatural construction of the Act 43 Eliz. c. 4. We conceive therefore that the doctrine that the legal estate passed by such a devise in England must be regarded as law. In the case of the *Incorporated Society* v. *Richards* (1 Dr. & War. 258) the land was devised to the corporation without any expression of trust, but as the corporation existed solely for charitable purposes, this was held equivalent to a devise upon a charitable trust.

We ought to repeat here that the existing Wills Act authorizes devises in general terms, so that a devise to a corporation is now valid, subject, however, to the right of the Crown to seize the land. But a devise on a charitable trust is rendered void by the Georgian Mortmain Act, unless to one of the few charities excepted from that Act.

Cases on the subject.

We will add here a list of cases relating to devises to corporations upon charitable trusts:—

Trinity College Case (M. T. 1566) (Dyer, 255 (*b*)). A devise to a college for schools and scholars, held good under the Act 1 & 2 P. & M. c. 8, s. 51, authorizing devises to spiritual corporations, if made within twenty years after the passing of the Act.

Mayor of Reading v. *Lane* (Hearne, 99; Duke, B. 361) (1601). A devise to the poor people maintained in the hospital of L. at R. for ever. The defendant was ordered to assure the land to the mayor and burgesses of R. for the maintenance of the hospital. The mayor and burgesses were incorporated and had a licence to take land in mortmain. It is possible that this case was decided on the Act 35 Eliz. c. 7 (1592–3), which enacts by s. 9 in statutes of the realm, and s. 27 in Remington's edition, that "it shall be lawful for every person, for and during the space of twenty years next ensuing, to make feoffments, grants, or any other assurances, or by last will in writing to give and bequeath in fee simple, as well to the use of the poor as for the provision, sustentation, or maintenance of any house of correction or abiding houses, or of any stocks or stores, all or any part of

such of his lands, tenements and hereditaments, and in such manner and form as he might have done to and for the provision, sustentation, or maintenance of any houses of correction or abiding houses, or of any stocks or stores, by force of the said statute."

The statute here referred to is apparently 18 Eliz. c. 3 (1576), which provides that lands held in socage may, during twenty years thereafter, be given towards the maintenance of houses of correction and stocks for the poor.

Champion v. *Smith* (1605–6) (Tothill, 30). A devise of copyholds out of London to the parson and churchwardens of Thames Street, on trust to sell and apply the proceeds in charity, held good.

Case of St. Olave's School, Southwark (M. T. 1612) (2 Bulst. 33). In this case a devise to a corporation was held good at law, so that they were entitled to maintain ejectment, and recover judgment. The will was made in 22 Eliz., but the date of the testator's death is not given.

Jesus College Case, alias *Lloyd's*, *Floyd's*, or *Flood's Case* (1615) (Hearne, 91; Duke, B. 363; Hob. 136; 1 Eq. Ca. Ab. 95, s. 6). Devise of land to Jesus College to find a scholar, held good under the stat. 43 Eliz. c. 4 as a limitation and appointment, the devise being considered void at law. The devise was made before the stat. 43 Eliz. c. 4.

An *Anonymous Case* in Moore, 852, 853 (T. T. 1616), is sometimes referred to on this point, but in that case the land was in London, and was merely charged with payment of an annual sum to the Merchant Taylors Company for charitable purposes. The devisees subject to the charge were held to take in fee.

Penniman v. *Jennings* (Tothill, 34), lands given to churchwardens, void in law, decreed hereabout (*i.e.* in Chancery), 2 Car. *i.e.* 1626–7.

Hellam's Case (1629) (Hearne, 95; Duke, B. 375). A devise to the Company of Leather Sellers, upon a charitable use, was held effectual, though the company was a corporation; but it is said that an order was made to settle the lands upon the company.

Mayor of Bristol v. *Whitton* (1633) (Hearne, 100; Duke, B.

377). This is called a devise of money to a charitable use, and it is said to have been resolved that, though Bristol was a corporation, the devise to them was good. It was apparently a devise of land, Tothill, 33.

Plate v. *St. John's Coll. Camb.* (1638) (Hearne, 89; Duke B. 379). A tenant in tail devised unsurrendered and unbarred copyholds to one for life with remainder to the defendant corporation by a wrong name. The remainder was held good in equity. This was reaffirmed on subsequent occasions. See *A.-G.* v. *Platt* (Finch, 221) (T. T. 1675), where an arrangement with the heir was held illegal.

Mayor of London's Case or *Case of St. Bartholomew's Hospital* (1639) (Duke, B. 380). A devise to the mayor and chamberlain for a charitable purpose, was held to mean mayor and commonalty and to be a good devise.

A.-G. v. *Newman* (H. T. 1670) (1 Ch. Ca. 157), *sub nom.* *R.* v. *Newman* (1 Lev. 284). A devise to Trin. Coll. Camb. to maintain a scholar, held good, following *Lloyd's Case* (Hob. 136); but it is stated in 1 Ch. Ca. that the decree was made with the defendant's consent.

Portreeve, etc. of Chard v. *Opie* (1673) (Finch, 75). A devise to a corporation in remainder, established; but the testator seems to have had only an equitable estate.

Pewterers' Co. v. *Christ's Hospital* (1 Vern. 161) (E. T. 1683). An executory devise to a charitable corporation held void for remoteness, and not challenged on any other ground.

A.-G. v. *Tancred*, alias *Christ's College Case* (Nov. 1757, Lord Keeper) (Amb. 351; 1 Bl. 90; 1 Eden. 10). A devise in 1746 to the masters of Christ's and Caius Colleges and certain other officials elsewhere for collegiate purposes at these colleges held good in equity, though made to persons incapable of taking in succession.

A.-G. v. *Lady Downing* (1767) (Wilmot's Cases and Opinions, 1; Amb. 550). A devise for charitable purposes made before the Georgian Mortmain Act with a direction to apply for incorporation, held good, with a discussion on devises to corporations.

Benet Coll. Camb. v. *The Bishop of London* (1778) (2 W. Bl. 1182). A devise to the plaintiff corporation by will dated in 1719, held to carry the legal estate, on the ground that the stat. 43 Eliz. c. 4, repealed *pro tanto* the exception of corporations from the Statute of Wills.

A.-G. v. *Mayor, Jurats and Commonalty of Rye* (7 Taunt. 546) (1817). A devise made in 1708 to the mayor, jurats and Town Council of Rye on trust to establish a school:—*Held*, that this meant the defendant corporation, and that they took an estate in fee simple in the land. The argument in this case was solely directed to the misnomer of the corporation. This was a question of law referred to the Common Law judges by the Court of Chancery.

A.-G. v. *Flood* (1817, Ireland) (Hayes, 611; Hayes & J. Appx. XXI.). The statute 43 Eliz. c. 4, does not extend to Ireland. In this case a testator duly made by will a devise of land in Ireland to Trin. Coll., Dublin, to maintain a professor of Erse, and give prizes for composition in Erse, Greek, and Latin, and purchase books and manuscripts in Erse, and other languages:—*Held*, the devise void at law, as being to a corporation, and the trusts to fall with it, because they were for purposes of the corporation. Careful judgments of the L. C. and C. J., who agreed that the devise would have been good in England, by reason of the stat. 43 Eliz. c. 4, and the decisions upon it. But this case has been overruled as to Ireland also, as mentioned below.

A.-G. v. *Skinners' Co.* (1826) (2 Russ. 416). The question is discussed in the judgment in this case.

A.-G. v. *The Master of Brentwood School* (1 M. & K. 376) (March, 1833, Leach, M.R.). This case was as follows:—

The Crown had authorized A. to found a school for the inhabitants of S., consisting of a master and two wardens, the same to be a corporation. A. founded it and devised land to it in 1565, on trusts partly for the purposes of the school and partly for poor persons at S. He died soon afterwards, and his heir-at-law entered upon the land. Thereupon in May, 1570, a suit was

instituted in the Court of Chancery by some inhabitants of S. against the heir—and the heir was ordered to convey the land to the school.

It was argued in 1833 that this must have been the voluntary act of the heir. But Sir J. Leach said, "I am of opinion, that although at this time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a Court of Equity would then execute."

Incorporated Society v. *Richards* (1841, Ireland) (1 Dr. & W. 258, Lord St. Leonards). In this case there was a devise to the Incorporated Society without mentioning any trusts, but as the Society existed only for charitable purposes, Lord St. Leonards held that the trusts were good in equity, though the devise was bad at law in Ireland, thus overruling *A.-G.* v. *Flood*, as above mentioned.

CHAPTER III.

On the Custom of the City of London.

Old London charters.

We have already mentioned that according to the custom of the city of London every citizen or freeman had the power to devise lands within the City to any corporation, notwithstanding the Plantagenet Mortmain Acts. The origin of this custom takes us back beyond the time of legal memory. The records of the city of London comprise charters granted by our kings as far back as the time of Henry I. (c. 1100), conceding to the citizens the right to have actions for lands decided according to their own laws. A charter of King John and later charters state precisely that this privilege only extends to lands within the City. (See the Liber Albus, translated by Riley, pp. 115, 118.) It is probable that the charter of the city of London served to some extent as a model for Magna Charta, conceding certain rights to all the citizens of the realm. Magna Charta itself was first promulgated in 1215, and repeatedly confirmed, notably in the 9th year of Henry III., 1225, under which date it figures as the first Act in our statute books.

Confirmed by Magna Charta.

The 9th clause of Magna Charta contains the following words:—

Civitas London habeat omnes libertates suas antiquas et consuetudines suas.	Let the City of London have all its ancient liberties and customs.

Custom to devise lands in London.

Now one of the customs of the city of London was to the effect that every citizen might devise his land within the City. The custom was doubtless highly valued, and stood in bright contrast with the feudal law outside the walls, where a land-

owner, having an infant heir, had the sorry prospect before him of leaving his land to fall into the hands of the Crown during his child's minority. The custom is noticed in many of the ancient records of the City, which also shew that wills of land within the City were proved before the mayor and aldermen in the Hustings Court of the City.

In one case (c. 1256) a widower claimed land under a will made by his wife during coverture, but his claim to probate thereof was successfully resisted by her heir, on the ground that by the custom of the City a married woman could not alienate land except by a public declaration under oath, made with her husband's concurrence in the Hustings Court (*William of Munchansey's Case*, Liber de Antiquis Legibus, A.D. 1256–7, Camden edition, p. 24; Riley's translation, p. 26); and see Bohun's Privilegia Londini, 1st ed. 156, 3rd ed. 211, for the power of a married woman to make a testamentary disposition in this way.

In or about 1258 a rule was laid down that the proof of a will, professing to devise a tenement, should not be delayed by a claim to the tenement set up by a third party, and that the proving of the will should not prejudice such a claim (Liber de Antiquis Legibus, A.D. 1258–9, Camden edition, 41; Riley's translation, 44). The wills enrolled in the Hustings Court from the year 1258 downwards are still preserved in the Guildhall records.

In 1268, when the Bishop of London was abroad, one Godfrey, who is described as guardian of the bishoprick, seems to have thought that the acts of the mayor and aldermen in proving wills were an infringement of the prerogative of the bishop. He accordingly directed the parish priests of the City to excommunicate a number of the officials who had taken part in proving wills. This led the citizens to apply to the king, Henry III., who addressed a mandate to the said Godfrey and compelled him to revoke his order. The king's mandate recites that the citizens of London had been accustomed from time immemorial, by grant of the king's predecessors, and the king himself, and by

ancient and approved custom, to devise their lands and tenements, within the liberty of the City, in their last will as they thought fit, and to admit proof of the will in their own presence in their Hustings Court in London; and proceeds to order a revocation of the sentence of excommunication (Liber de Antiquis Legibus, Camden edition, 106; Riley's translation, 111). Custom firmly established.

We may here observe that this municipal probate only applied to devises; and if a will affected goods and chattels as well as land, it required to be proved before the ordinary. Moreover the proof before the ordinary was usually made before the municipal probate; at least such was the usage in later times (Bohun's Privilegia Londini, 1st ed. (1702), p. 156, 3rd ed. (1723), p. 211; *Netter* v. *Brett*, Cro. Car. 395 (H. T. 1635), citing p. 246 of The Register, but *quære*, what Register ?).

Some later entries shew us that the custom was restricted by a rule that a man could not devise more than a life estate to his widow, but if a fee were devised to her, she might waive the reversion and take for life only (Riley's Liber Albus, 194, under dates 1304–5, 1308–9, and 1321–2). This restriction has been removed by the Wills Acts.

The custom to devise land in London being thus firmly established before the year 1279, the Statute de Religiosis supervened in that year, preceded by the lost Act mentioned in its preamble. According to modern ideas, this statute would have superseded both the prior provision in Magna Charta and the Crown grants contained in the charters of the City, and we shall find that the Law Courts adopted this view in later times. But the supreme legislative power of Parliament was not completely realized in the year 1279. Mortmain Acts supervene.

Only some twenty years previously the Earl of Leicester, after procuring the ordinances of the so-called Mad Parliament, at Oxford, had brought them to the city of London, and asked the City officials to assent to the same, and they had given their assent subject to a reservation of all their ancient customs and liberties. A few years later, namely, in 1265, the boroughs had been invited to send representatives to the Parliament which

was summoned after the battle of Lewes; but during the next thirty years they were only occasionally summoned, and the statutes were still expressed to be ordinances of the king made on the advice of his council, differing little in appearance from ordinances made on his own authority alone. Still the power to legislate for the city of London was consciously felt; indeed, the Statute of Gloster, promulgated in 1278, contains several clauses expressly relating to actions respecting land in London (6 Edw. 1, cc. 11–14). This statute, however, was probably made on a petition of the citizens of London; and, anyhow, it is clear that the citizens succeeded in maintaining that their customary right of devising land within the City was not affected by the Plantagenet Mortmain Acts. It was only natural that they should set a high value upon their power of devising land by will; and the Crown had no interest in extending the Mortmain Acts to the city of London. According to the terms of the Crown charter the City officers paid a fixed annual sum to the Crown, called their "firma," a fee farm rent in fact; and the custody of orphans within the City, and the rights resembling the feudal incidents of the tenure of land belonged to the same officers (Riley's Liber Albus, pp. 114 *et seq.*, and see on p. 419 *Alice Fourneux's Case*, in which the mayor and aldermen obtained redress for a breach of their right to dispose of an infant heiress in marriage).

Devises in mortmain still upheld in City Courts.

Soon after the Statute de Religiosis a case came before the mayor and aldermen, which may well have suggested the question, whether the Statute de Religiosis affected the customs of London. It appears that the will of one Osbert, of Suffolk, had been proved in 1284, and that he devised certain houses in the City to be sold and the proceeds to be applied in providing certain divine services to be performed for the souls of himself and his wife and all the faithful departed, and the surplus to be paid towards the repair of London Bridge. Nevertheless his heirs claimed these houses in 1303, but the Court decided against them, though with two dissentient voices. But the grounds of the heirs' claim, and the reasons for the decision and

the dissents, do not appear, and we can only conjecture that the effect of the Statute de Religiosis was discussed, inasmuch as we find that the City judges at a later date regarded the founding of a chantry as coming within the provisions of that statute (see the judicial opinion given in 1378, stated below), and the king's judges did so also (40 Edw. 3, case 26). Anyhow, two years later, namely, in 1305, a unanimous decree was pronounced under the same will, ordering certain persons, probably the devisees of the houses, to sell them and apply the proceeds in fulfilling the terms of the will as above-mentioned (*Case of Osbert's Will*, Liber Albus, Riley's translation, p. 108).

Charter of Edw. III. sanctions devises in mortmain.

In March, 1327, immediately after the accession of Edward III., the citizens procured a new charter containing a special clause to the effect that they might devise their tenements within the City as well in mortmain as in any other way, and this clause has been repeated in all subsequent charters (Riley's Liber Albus, pp. 130, 142, 149; Norton's History of the City of London).

A few years later, namely, in 1340, the Act 14 Edw. 3, st. 1, c. 1, confirmed the Great Charter, and added that the city of London and all other cities and boroughs in England should have all their franchises and customs. And this may be considered as adding Parliamentary sanction to all the Crown charters prior to that date.

King's Courts refer the power to the charter.

Under the date 1344 we find a case in the Book of Assizes, 18 Edw. 3, case 24, in which a custom to devise land in mortmain without licence was upheld, and the custom of London was referred to. The Court appears to have expressed an opinion that that custom rested upon the charter granted in the first year of the king's reign, and that the citizens had not the right before that date.

Under the date 1366 we find a case in the Book of Assizes, 40 Edw. 3, case 26, in which an escheat was upheld of lands in London devised in mortmain. The custom does not appear to have been pleaded, nor the charter; but a usage to perpetuate such a devise was dragged in by the Crown. The land was

devised to A. to pay an annual sum to find two chaplains to sing for the testator's soul for ever. This was held to be a mortizement, and the Crown was held entitled to the rent-charge. In the same case the sustenance of a lamp was held not to be a mortizement.

And confined to citizens.

We must next notice a case which is given in the Book of Assizes as 38 Edw. 3, c. 18 (1364), and in the Year Book as 45 Edw. 3, p. 26, case 39 (1371). One Otes devised land in the City in mortmain. He was not proved to be a citizen. It was held that the Crown could seize the land, as the privilege of devising in mortmain did not extend to any who were not citizens.

Who are citizens.

This leads us to consider who are citizens. It appears that in early times all persons who resided in the City and paid certain City taxes, called scot and lot, acquired the rights of citizenship, and citizenship was lost by non-residence and avoidance of these imposts. Hence these words are sometimes dragged into the discussion of our subject. But in more recent times this mode of acquiring citizenship has come to an end; and it is now clear that the class of citizens includes only the following persons: (1) persons to whom the freedom of the City is granted by the Court of Aldermen on payment of a sum of money, or as a compliment; (2) persons who serve an apprenticeship with a freeman and so procure admittance; (3) sons and daughters of freemen born after their fathers obtained the freedom, who themselves after attaining twenty-one apply to be admitted; and (4) widows of freemen so long as they remain widows. All other persons are called foreigners in this respect.

We should next notice a curious entry contained in the records of the City, of the date 1378, which is of sufficient interest to warrant its insertion in full here. It is in the following words:

Common Council claim right independent of charter.

"Be it remembered, that at a meeting of the Common Council of the city of London, holden on the Thursday next before the Feast of Saint Michael, in the second year of the reign of King Richard the Second, for the removing of doubts which existed

among parties pleading as to certain ancient customs of the said City, and as to whether the following was an approved custom or not:—that is to say, that when a person, a freeman of the said City, by his testament, proclaimed and enrolled according to the custom of the said City, devises lands, tenements, or rents unto a chaplain or chaplains for the maintenance for ever of any chantry and chantries, or for other works of churches, or the yearly celebration of anniversaries, or for finding, making, or maintaining for ever any lights, or other divine services, or works of piety; although at the time of the devise, or at the death of the devisor, there may not be any parson capable, or any chantry existing, as to which such devise may take effect; and although the execution of the last will of such testator may by his executor or executors not be fulfilled, by neglecting to present a fitting parson or parsons unto such chantry or chantries, or to find such lights, works of churches, anniversaries, or other works of piety; and although in such testament, through negligence or ignorance on part of the writer, there may not be special mention made of the names of the parsons who are to celebrate the same, nor yet of those who are for ever to present unto the same; and further, although in such testament there may not be inserted a clause of distress, or the names of those by whom such distress shall be made, in case that the will of the testator shall not be fulfilled. Nevertheless, if by words in such testament contained, an interpretation may be made, conceived, or reasonably estimated, that it was the last will of the testator to found such chantry, lights, divine services, or such works of piety, for ever to be maintained, made, or found, the rector or parishioners of the church unto which such chantry, lights, divine service, or other like work of piety pertains, or, in default of them, the mayor and aldermen, may unto such chantry, &c., present a fitting parson, as heretofore in like cases, as well for all time before the charter unto the citizens of London by King Edward, the Third since the Conquest, of happy memory, granted, as since the date of such charter, they have been wont to present; as also, for arrears, if any, distrain upon the lands and tenements from which the

rents for maintaining such chantry, lights, divine services, or works of piety, ought to proceed; in accordance with the effect, intention, and last will of the testator. Provided always, that such interpretation, understanding, and reasonable estimate of the last will of the testator, shall by the mayor and aldermen of the said City, and not by others, in accordance with ancient customs, good faith, and justice be made; and that whatsoever shall in such case by them be so adjudged shall remain in perpetual strength and force. Upon this, as before stated, becoming a matter of question, the Common Council marvelled that so old a custom should as between any parties pleading in London become matter of doubt.

"And therefore, by Nicholas Brembre, then mayor, and so individually by each alderman, and then by the rest of the commoners, answer was generally made, and it was unanimously and positively attested, as to the whole of such enquiry, that for all time, before the obtaining of the said charter as well as since, the same had been in the City an approved custom; and to the end that the same might not thereafter become a matter of doubt, they commanded that among the other memoranda of the said City entry should be made to such effect" (Riley's Liber Albus, p. 386).

Rather more than a century later we find some cases which do not quite accord with the principles above indicated.

Law Courts regard devising power as incident to tenure; license in mortmain as confined to freemen and citizens.

In the Year Book (5 Hen. 7, p. 10, case 1, H. T. 1490), a case occurs in which a defendant pleaded the custom that a citizen could devise land in London; and on the plaintiff objecting that the custom only extended to those who were both citizens and freemen, the defendant amended his plea in that respect. The plaintiff then traversed the allegation that the defendant was a freeman, and the statement of the case ends with an observation of the reporter that the custom to devise was general, but the power of devising to guilds and corporations was restricted to freemen, as was shewn by later cases. The case, however, shews that a distinction was drawn between citizens simply and those who were both citizens and freemen.

The former word probably included all residents who were assessed to scot and lot; the latter only such as were formally admitted to the freedom of the City.

A few months later, in the same Year Book (5 Hen. 7, p. 18, case 12, E. T. 1490), we find Bryan, C.J., expressing an opinion that the custom to devise in the City extended to foreigners as well as citizens, but the power to devise in mortmain was restricted to freemen and citizens. And a few years later we find this view adopted by the City authorities in the Year Book (11 Hen. 7, p. 21, case 8, E. T. 1496).

Before stating the last-mentioned case, we may premise that a charter of Edward IV., confirming one of Richard II. (Riley's Liber Albus, p. 143), provided that, when any custom of the City was in dispute in the Law Courts, the mayor and aldermen might decide it, and send their recorder to certify their decision in court (Pulling's Laws of London, p. 9). In the course of time it became usual for the recorder to bring a written certificate to the court and depose to its correctness. The certificate was conclusive, unless the City was itself interested in the action, in which case the question of the custom was left to the jury (*Day* v. *Savage*, Hob. 87) (c. 1613–25).

We can now state the case in the Year Book (11 Hen. 7, p. 21), which is in words which may be translated as follows:—

"Note, that Fitzwilliams, Recorder of London, certified this term in the Common Bench, that the custom of the city of London was, that each one that had lands or tenements within the said City could devise them by his will, as well foreigner as he that is citizen and freeman of the said City. And the reason is, as I understand, because that custom is incident to the land, and not to the person." The City officials adopt this view.

The adoption of this view by the City authorities was probably prompted by the jealousy with which the citizens guarded their testamentary power. But if it is to be regarded as law, it would seem to follow that the power of devising in mortmain rested solely on the Crown charter, as is intimated in the cases above mentioned; but this is contrary to the judicial opinion recorded

by the Common Council in 1378, also mentioned above. Coke, also, regards a custom of devising in a city or borough as confined to the citizens or burgesses (Co. Litt. 111 a). But Swinburne, writing in 1611, accepts the conclusion that the custom of devising in London was an incident of the tenure of the land (Swinburne on Wills, 74); and there is a note in Dyer, 255 (*b*), under date M. T. 1566, to the same effect (see also Viner's Abr. vii. 239).

The matters stated above, however, appear to shew that, in point of fact, devises in mortmain by citizens were held valid by the City courts, and left unmolested by the Crown in the interval between the first Mortmain Act and the charter of Edward III.; and the principle that such devises contravened the Mortmain Acts appears to be a legal theory which was adopted at a later date.

Later history of City charters.

The charters of the city of London are all framed as permanent grants by the Crown, and there have been no surrenders of the earlier charters in exchange for the later ones. In general each charter repeats the provisions of its predecessors, and adds further clauses, but no one of them professes to be a complete code of the constitution and laws of the City. Charles II., in the early part of his reign, granted a charter to the City, reciting all the earlier charters and confirming them, and this may be looked upon as the prevailing charter. One clause in this charter declares: "Furthermore, we have granted for us and our heirs to the said citizens that they, their heirs and successors, may bequeath their tenements within the liberties of the aforesaid City, as well in mortmain as in other manner, as of ancient time they have been accustomed to do" (Gent's translation, 1680, p. 42).

However, in 1683, the celebrated decision was given, in which, on a writ of *quo warranto*, the judges decided that the City had forfeited its charter. But after the Revolution, in 1688, this decision was reversed by Act of Parliament (2 W. & M. c. 8), and it was enacted, "That the mayor and commonalty and citizens of the said City shall and may, as by law they ought,

peaceably have and enjoy all and every their rights, gifts, charters, grants, liberties, privileges, franchises, customs, usages, etc., which they lawfully had, etc., at the time of giving the said judgment."

The power of the citizens to devise in mortmain stands on this basis now. We have seen that no mesne lord intervened between the Crown and the City, so that the licence of the Crown alone was always sufficient to authorize alienations in mortmain within the City, as it is now throughout all the realm. But the Crown cannot dispense with general Acts of Parliament, except where, as in the case of the Plantagenet Mortmain Acts, they simply confer rights upon the Crown itself. Accordingly, wills of land within the city of London are now subject to the same law as other wills. They were subject to the provisions of the Statute of Frauds relating to wills, and are subject to the modern Wills Act. Moreover, all peculiar jurisdictions to grant probate of wills have been taken away by the Probate Act, 1857, 20 & 21 Vict. c. 77, s. 3, so that the proof of wills in the Hustings Court is at an end. But, in point of fact, the custom of proving wills there had fallen into disuse many years prior to that Act.

City probates abolished.

It is stated that the latest date at which any will was proved in the Hustings Court is 1692. There does not appear to be any reason for the cessation of probate at that date; and we can only conjecture that City probates fell into abeyance, because actions for land in the City Courts fell into abeyance also. The only actions for land entertainable in these courts were the old real actions. These were gradually superseded in the King's Courts by the fictitious action of ejectment between John Doe and Richard Roe. The City Courts never had jurisdiction to entertain that action, possibly because John Doe and Richard Roe were not citizens of the city of London. Hence ejectment for lands in London was brought in the Common Law Courts, and if the title of either party depended on a will, such will was proved in the course of the action.

There is also no reason to doubt that the custom of the City is controlled by the Georgian Mortmain Act, so that no land

Custom controlled by Georgian Mortmain Act.

within the City can be devised to any corporation for a charitable purpose, or to any corporation of which the corporate purposes are charitable. It is mentioned in Highmore on Mortmain, p. 127, that Sir R. P. Arden, M.R., in 1793, expressed a clear opinion to this effect.

It is also noticeable that no claim was ever made by the citizens to have power to convey land in mortmain by acts *inter vivos:* a circumstance which shews that it was only their testamentary power which they guarded with jealousy. On referring to the case of *A.-G.* v. *Fishmongers' Co.* (*Preston's Will*) (2 Beav. 588; M. R. 1839; and on app. 5 M. & Cr. 16) (Lord Chancellor Cottenham, 1841), it will been seen that the Court found that the Fishmongers' Company, prior to 1435, had purchased land in the name of Henry Preston, and that he by will dated in that year devised it to the company. It was argued that such a transaction was an abuse of the custom and a fraud on the Plantagenet Mortmain Acts, but the Court treated the transaction as lawful and proper. It would not be wise, however, for any City Company to adopt such a device for acquiring land in the present day.

Besides the cases stated above, some notice of the custom may be found in the following cases: *Anon.* (Dyer, 33, s. 12) (E. T. 1537); *Anon.* (Dyer, 155, s. 21) (M. T. 1557, mentioning also the date 1563); *Sadlers' Co.'s Case* (4 Co. Rep. 54 (*b*)) (T. T. 1588); *Case of City of London* (8 Co. Rep. 129) (H. T. 1610); *Standish* v. *Short* (J. Bridg. 103) (M. T. 1616); *Lancelot* v. *Allen* (Cro. Car. 248) (T. T. 1627, and H. T. 1632); *Netter* v. *Brett* (Cro. Car. 395) (H. T. 1635); *Mayor and Commonalty of London* v. *Alford* (Cro. Car. 576) (H. T. 1640); *Middleton* v. *Cater* (4 Bro. Ch. Ca. 409, July 1793).

Middleton v. *Cater* (4 Bro. Ch. Ca. 409, July 1793) is sometimes cited as shewing that the custom for citizens to devise land in mortmain still exists. But all that happened in that case was an argument to that effect, followed by a judgment that the land in question was outside of the City limits, and the devise void. The will was made after the Georgian Mortmain

Act, and was obnoxious to that Act, but that point is not noticed in the report, or rather the argument involves a juggle with the word "mortmain," as if the power to devise, notwithstanding the Plantagenet Mortmain Acts, included a power to devise notwithstanding the Georgian Act.

But still exists so subject.

It seems, however, to follow from the facts above stated that citizens of London still have the power of devising land within the City to corporations, provided that they do not so devise it upon charitable trusts, and the corporations are not themselves charitable institutions.

CHAPTER IV.

On the Statute 43 Eliz. c. 4.

Stat. 43 Eliz. c. 4.

The statute 43 Eliz. c. 4 was passed in the year 1601. It recites that land, money, and other property had been given for various charitable purposes, which it enumerates, and had not been always properly applied, and it then authorizes the Lord Chancellor and the Chancellor of the Duchy of Lancaster to appoint commissioners to inquire into such gifts, with power to make orders for the proper application of the property, with an appeal to the Chancellor himself in each case.

Strained so as to obviate legal technicalities.

We have already mentioned that an unnatural construction was put upon this statute, and that this construction has been disapproved in modern times, though the decisions based upon it could not be overruled. But in criticising the decisions of former judges, we must remember that when they lived the law itself was in an unnatural state. A copyholder could not devise his copyhold land by will unless he had first surrendered it to the use of his will. The owner of land held of the Crown by knight's service could only devise two-thirds of it by will, though he could alienate the whole by feoffment. A tenant in tail could not bar reversioners and remaindermen without suffering a recovery, while either a fine or a recovery was necessary to bar his issue in tail. The judges then, being favourably disposed to charities, took hold of the statute of Elizabeth and used it as a ground for holding that so far as conveyances for charitable purposes were concerned, all legal formalities were dispensed with; and that if the persons entitled to any property shewed an intention to give it to charity, and were competent so to do, the gift would be established. They even went so far

as to give a retrospective effect to the statute, and held that it validated a charitable devise of land made at a time when land could not be devised at all, that is to say, before the Statute of Wills in the reign of Henry VIII.: *Collinson's Case*, Hob. 136; Hearne, 81 (1617), *sub nom. Rolt's Case*, Moore, 888; see also *Smith* v. *Stowel* (1 Ch. Ca. 195, H. T., 22 & 23 Car. 2, 1671), where the defect is not stated. On other points they held that the statute validated a devise of unsurrendered copyholds [*Rivett's Case* (Hearne, 83; Moore, 890; Duke, B. 366) (1617); *A.-G.* v. *Andrews* (1 Ves. Sr. 225) (1748).] But in *A.-G.* v. *Lady Downing* (Amb. 571) (1769) there was a devise of unsurrendered copyholds for certain particular estates with remainder to a charitable use, and the devise was held wholly void. This must be taken to overrule the earlier cases of *Plate* v. *St. John's Coll. Camb.* (Duke, B. 377; Hearne, 89) (1638), and *Portreeve, etc. of Chard* v. *Opie* (Finch. 75) (H. T. 1673), in which unsurrendered copyholds were devised for particular estates with charitable remainders, and effect was given to the charitable remainders.

Conflicting decisions were given on the question, whether a tenant *in capite* holding land of the Crown by knight's service could devise the whole of his land in charity, in the interval between the Statute of Wills (32 Hen. 8, c. 1) (1540), and the abolition of military tenures (12 Car. 2, c. 24) (1660), when he could only devise two-thirds of such land for other purposes. See *Floyd's Case*, alias *Jesus Coll. Case* (Duke, B. 363; Hearne, 91; Hob. 136) (1615), for, and *Lord Edward Montague's Case* (Duke, B. 370; Hearne, 92) (1619) against, a devise of the whole; and *Christ's Hospital* v. *Hawes* (Duke, B. 370; Hearne, 106) (1620) for, and *Ascough* v. *Phillips* (Sir W. Jones, 428) (1639), against, and *Higgins* v. *Town of Southampton* (3 Rep. Ch. 38) (Jan. 1671), for it.

The cases of Lord E. Montague and Ascough were cited in the last case, and the point was decided on the ground that the testator could have made his disposition by deed.

Up to this point the decisions have only a historic interest, inasmuch as the necessity for a surrender in order to devise

copyholds is now abolished, and a free power of devising land has been given by converting knight's service tenure into socage tenure. But other decisions on the statute of Elizabeth may be cited as authorities in the present day. It is true that the Georgian Mortmain Act invalidates charitable devises in general, but a few favoured charities have been excepted from that Act, and in their case some of the questions decided under the statute of Elizabeth may recur. We have already mentioned the question of devises to corporations, and seen that devises to corporations for charitable purposes were held effectual, notwithstanding the Plantagenet Mortmain Acts, and according to the weight of the authorities the corporation took the legal estate. Other decisions established charitable devises by tenants in tail. Thus in *A.-G.* v. *Rye* (2 Vern. 453) (Dec. 1703), a tenant in tail devised land for the maintenance of a schoolmaster, and other charitable uses; and this was held good, on the ground that the intent of the Act (43 Eliz. c. 4) was to make the disposition of the party as free and easy as his mind, and not to oblige him to the observance of any form or ceremony, either of lease and release, or common recovery, or fine. This was neither the first nor the last time that this point was decided. Similar decisions will be found in *A.-G.* v. *Burdet* (2 Vern. 755) (Feb. 1717), and *Tay* v. *Slaughter* (Prec. Ch. 16; Duke, B. 381) (1690), while a still stronger decision was given in *Plate* v. *St. John's Coll. Camb.* (Duke, B. 379; Hearne, 89) (1638). There a tenant in tail of copyhold land purported to devise it to A. for life with remainder to the defendant college for a charitable purpose. The heir in tail claimed the land, and it was held that he might recover against A., but that the remainder to the college would be good, though it would be a remainder unsupported by a particular estate. This case appears hardly consistent with *A.-G.* v. *Lady Downing* (Amb. 571) (1769) which has been mentioned above, and may possibly be considered as overruled by it. It appears to be fairly open to question whether this power of a tenant in tail to devise land for certain charitable purposes is or is not controlled by s. 41 of

And allow tenant in tail to devise.

the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74) (August 28, 1833).

But not remove personal disabilities,

Other decisions under the Act show that the judges held that it only supplied defects in the form of gift, and would not remove any incapacity affecting the donor. Thus, in the above-mentioned case of *Floyd* or *Jesus College* (Duke, B. 363), the Court laid down that a devise to a charity by an infant or lunatic would be void. And in *Bramble* v. *Havering poor* (Duke, B. 508 (1639)) a charitable devise by a *feme covert* was held void. But in *Damus' Case* (Duke, B. 362 (1614)), a charitable gift of a *chose in action* in a will made by a married woman was held effectual. It was also held in *Hungate, Ex parte Sherborn* (Duke, B. 374 (1627)), that an attempted gift of a *chose in action* for a charitable purpose would be upheld, although such property was not assignable at law. Cases might arise in the present day in which this case would be applicable as an authority.

or supersede Stat. Frauds.

After the Statute of Frauds was passed the Courts held that a charitable devise of freehold lands by an unattested will was void, but a similar devise of copyholds was still good, as the statute did not include them: *A.-G.* v. *Barnes* (2 Vern. pt. 2, 597 (1707)). The Courts also refused to give effect to a charitable devise of lands made by a nuncupative will prior to the Statute of Frauds: *Jenner* v. *Harper* (1 P. Wms. 246 (1714)); though an earlier decision had been given in favour of such a devise, namely, *Stoddard's Case* (Duke, B. 373 (1622)).

List of charities in Stat. Eliz.

A more proper use has been made of the statute 43 Eliz. c. 4, by paying regard to the list of charitable purposes contained in it. This is treated as an expression by the legislature that all such purposes are lawful charitable purposes, and a guide to the Courts in deciding on the legality of other purposes.

The list contained in the statute is as follows:—

(1.) The relief of aged, impotent and poor people.

(2.) The maintenance of sick and maimed soldiers and mariners.

(3.) The maintenance of schools of learning, free schools, and scholars in universities.

(4.) The repair of bridges, ports, havens, causeways, churches, sea-banks, and highways.

(5.) The education and preferment of orphans.

(6.) The relief, stock, or maintenance for houses of correction.

(7.) Marriages of poor maids.

(8.) The supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed.

(9.) The relief or redemption of prisoners or captives.

(10.) The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

Sir F. Moore's disquisition.

The statute is said to have been penned by Sir Francis Moore, who also wrote a disquisition upon it, which is printed in Duke on Charitable Uses. This disquisition refers to several cases and Acts of Parliament, including the Statute of Limitations of 21 Jac. 1 (1623), and must therefore have been written or touched up after that date. But many of the principles enunciated in the disquisition have not been adopted in later cases, and much of it relates to questions which cannot arise under the existing law, so that it is not worth reprinting, but reference will be made to it occasionally in considering the various heads of charitable trusts. The list of charities, moreover, contained in the Statute of Elizabeth does not form a good system of division of the subject at the present day.

The procedure instituted by the statute 43 Eliz. c. 4, was followed for about a century and a half, but it then went out of favour, being superseded by the more convenient method of an information by the Attorney-General; and since the first decade of the present century it has not been employed at all. The Act, however, remained on the statute book until the present year, but it has now been formally repealed by the Mortmain and Charitable Uses Act, 1888.

Stat. Eliz. repealed.

Charity may be indiscreet.

We may add here a curious case in which a disquisition upon the word "charity" has recently taken place. It was an old settled rule of the Common Law that if A. assisted B. to bring an action against C., he committed a legal offence called maintenance, and was liable to be sued by C. for any damage caused

thereby. But this rule was qualified by another, namely, that if B. was poor and A. assisted him out of charity, no such action would lie. *Harris* v. *Brisco* (17 Q. B. D. 504) was a case of this nature, in which it was also proved that the defendant acted indiscreetly in not inquiring into the alleged rights of the poor man whom he aided. It was held, however, that he had a good defence to the action. The judges of the Court of Appeal held that they could not credit their predecessors 400 years ago with calling nothing charity which was not discreet charity; a view which, they said, even now is present to the minds only of a select few, and does not commend itself to a large proportion of the kind-hearted and charitable amongst mankind.

We may further remark that if Parliament creates any special perpetual trust, the Courts will be disposed to treat such trust as a charity. Thus, in *In re Christchurch Inclosure Act* (38 Ch. D. 520; March 1888, C. A.), an inclosure Act directed a portion of a common to be allotted in trust for the occupiers for the time being of certain cottages in lieu of their claim to rights of turbary, and this was held to create a charitable trust.

Defective exercise of power aided in favour of charity.

In connection with the subject of this chapter it may be added that if a power authorizes a non-testamentary appointment, and the donee of the power purports to exercise it in favour of charity, by some document in writing, the Court will carry out the appointment, although the forms prescribed in the creation of the power may not have been all fulfilled. The Court gives the same relief in the case of defective exercises of powers in favour of a wife, child or creditor of the donee, or a purchaser from him; so that the jurisdiction cannot be referred to the Statute of Elizabeth. Of course a power to appoint by will alone can only be exercised by a will made in compliance with the Wills Act (see 1 White and Tudor's Leading Cases in Equity, sub. *Tollet* v. *Tollet*).

CHAPTER V.

On Gifts for Superstitious Purposes.

Superstitious and forbidden religious trusts distinguished.

It is very common to find superstitious trusts and forbidden religious trusts confused; but they differ both in their nature and their legal incidents.

Trusts, which are not intended to benefit any particular living individuals, or the general public, but which are designed for the supposed benefit of the soul of the testator or other deceased persons, are called superstitious trusts.

On the other hand, trusts for the promotion of religious views, to which penalties are for the time being attached by law, are forbidden religious trusts.

Thus superstitious trusts and forbidden religious trusts differ in their nature. They also differ in their legal incidents. For superstitious trusts have been held to be simply void, and the benefit of their failure goes to the residuary beneficiary. But trusts for promoting forbidden religious views have been made subject to a rule of peculiar injustice; for it has been held that only the particular application of them fails, but the general charitable intention of promoting religion is good; and the property will accordingly be devoted to some religious or charitable purpose which the law does permit, and the Crown has the right of appointing it: *West* v. *Shuttleworth* (2 My. & K. 698).

The difference between superstitious trusts and forbidden religious trusts is again seen in this: that when the penalties inflicted on the promotion of any particular religious views are removed, and the religion is brought within the Toleration Acts or placed upon the same basis as the systems within these Acts,

trusts for the promotion of that religion cease to be unlawful, and become on the contrary good charitable trusts. But the removal of the penalties, inflicted on the promotion of any particular religion, has no effect whatever on trusts for superstitious purposes sanctioned by that religion: such trusts remain as void as before.

Property devoted to superstitious purposes before the Reformation.

We can now proceed to consider what trusts at the present day are regarded as superstitious by the law. Here again we must revert to the history of the subject. It is quite clear that, prior to the Reformation, many trusts for the supposed good of souls were regarded as valid which would now be deemed superstitious (*see* Co. Litt. ss. 383, 135, and 169, and the cases under the statute 1 Edw. 6, c. 14, hereinafter referred to). Now, subject to the question raised by the statute 1 Eliz. c. 24, s. 8, hereinafter mentioned, there was no distinct Act of Parliament enacting that for the future certain purposes, thitherto considered religious, should be deemed superstitious; but the courts of law drew a conclusion from the change of religion, that certain religious ceremonies, not sanctioned by the reformed religion, and being for the supposed benefit of the souls of deceased persons, were thenceforth to be regarded as superstitious. Parliamentary authority for this change in the law may be said to be conferred by the statute 1 Edw. 6, c. 14, which recites that "a great part of superstition and errors in Christian religion had been brought into the minds and estimations of men . . . . by devising and fantasying vain opinions of purgatory and masses satisfactory, to be done for them which were departed," which doctrine was maintained "by the abuse of trentals, chantries, and other provisions." The statute further recites that the property devoted to such purposes ought to be devoted to founding schools and other good purposes; and that the king ought to be entrusted with the execution of that design; and then, by s. 2, all colleges, free chapels, chantries, and lands given for finding a priest, are vested in the king. Subsequent sections gave to the king all lands and charges upon lands devoted to the finding or maintenance of any anniversary or obit, or other like thing, intent or

Vested in the Crown by 1 Edw. 6, c. 14.

purpose, or of any light or lamp in any church or chapel to have continuance for ever, which had been kept or maintained within five years next before that Parliament. The 7th section also gave to the king the property of all brotherhoods or guilds, except trading companies. The universities and public schools were exempted from the Act.

It will be seen that the enacting clauses of this Act go far beyond its recital; but it only applied to matters then existing, and said nothing about trusts thereafter to be created.

Cases under the Act 1 Ed. 6, c. 14.

This Act gave rise to numerous decisions, made on claims by the Crown, or grantees from the Crown, against persons in possession of lands devoted to the purposes named in the Act. In some cases the land itself was held to be vested in the Crown. In other cases the Crown was held entitled only to some annual payments issuing out of the land for the purposes specified. A good summary of the early cases upon the Act will be found appended to *Adams and Lambert's Case* (4 Co. Rep. 104); and a discussion of them may also be found in Shelford on Mortmain, c. 2, s. 3, and Duke on Charitable Uses, B. 349; but both Shelford and Duke confuse together gifts under the Act, which go to the Crown by virtue of the Act, and superstitious gifts subsequent to the Act, which are void by general law. The cases under the Act have no direct bearing on modern law, but they have nevertheless been cited in some recent cases: see *A.-G.* v. *The Fishmongers' Company, Knesworth's Will* (2 Beav. 151, Nov. 1839, M. R. and 5 M. & C. 11, Jan. 1841, L. C.), and *A.-G.* v. *Vivian* (1 Russ. 226, Aug. 1826); and they have an indirect bearing both on the question what is a superstitious use, and on the question of separating a superstitious use from a good charitable use, or a private gift, so that some notice of them may be desirable to complete our subject.

We will proceed therefore to mention first the cases which are appended to *Adams and Lambert's Case* (4 Co. Rep. 113), giving them in the order in which they are there stated, and to add such later cases as are to be found in the reports.

Sir B. Read's Case (Moor, 654). Testator devised lands in

London to the Goldsmiths' Company, to keep an obit and spend at it yearly 33*s.* 4*d.*, and find perpetually a priest to sing mass for his soul, who should also keep a grammar school, chiefly for the poor, and receive £10 yearly for his salary. The lands were worth £50 per annum :—*Held*, all given to the king by the Act, the good use of keeping a grammar school being tainted by the superstitious use of praying for the testator's soul.

Sir John Tate's Case (Duke, 94 ; Hern. 208). A like devise to find a secular priest for ever to pray for souls in the church of M., paying to him a competent living, not less than eight marks per annum. The houses were of greater value :—*Held*, all given to the king.

John Allen's Case (1 Anders. 97 ; Moor, 264). A like devise to find an obit for ever. The houses brought in £33 13*s.* 4*d.* per annum, and only 23*s.* 4*d.* per annum was spent on the obit :—*Held*, all given to the king.

Peter's Case (Duke, 95 ; Hern. 209). A like devise to pay to such priest who should pray for his soul in the church of C., £9 6*s.* 8*d.* for his salary. The king does not take the houses ; but, of course, he took the annual sum.

Walpool's Case (Duke, 95 ; 2 Sid. 14 ; Hern. 209). A like devise of houses worth £30 per annum, to find two priests, paying to each £6 13*s.* 4*d.* for his salary :—*Held*, that the Crown took the whole property.

Caley's Case (Moor, 653 ; 1 Anders. 96). A like devise of houses worth 40 marks per annum, to maintain a chaplain in the church of M., to sing mass every day for the souls of S. and his wife, and to have for his salary £6 13*s.* 4*d.*, and to find an obit in the same church for the soul of the said S., spending upon it 20*s.*, part being distributed among poor persons to pray for souls in Drapers' Hall :—*Held*, the houses themselves given to the Crown.

Gregory's Case (4 Co. Rep. 114). A like devise of houses worth 4 marks per annum to find an obit for ever in the church of A., spending at it 6*s.* 8*d.*, and to distribute among the poor of the parish to pray for one soul 6*s.* 8*d.*, and repair and rebuild with the residue :—*Held*, the houses given to the Crown.

Hewet v. *Wotton* (Duke, 92; Moor, 131; 1 Anders. 100; 4 Co. Rep. 109 b). Grant of lands to feoffees and direction to them to find a priest to sing mass in the church of M. every Sunday, and a dirge and mass *de requiem* once a year for the donor's soul, and to pay the priest 2*d.* a week, and the residue of the profits to be employed upon books, vestments and other ornaments of the church:—*Held*, that the king only took the priest's stipend.

Chibnal v. *Witton* (Duke, 92; 2 Sid. 15; 4 Co. Rep. 109 b). Devise in London to pay 3*s.* 4*d.* yearly to the poor of the Guild of Drapers, 3*d.* a week to a chaplain for ever to celebrate mass for the testator's soul, 6*d.* a week to three poor persons of the parish to pray for his soul, 13*s.* 4*d.* yearly for an anniversary as follows, 4*d.* to a chaplain, 12*d.* to the churchwardens for repair of the church, 12*d.* to the sustentation of a brotherhood of S. Christopher, and the rest of the 13*s.* 4*d.* in bread and drink to the chaplain and other poor persons to pray for his soul, 6*s.* 8*d.* to the churchwardens for their trouble, and the rest for repairs and restoration of the property devised:—*Held*, that the king should not take the entire land, because the gift of 3*s.* 4*d.* to the poor of the Guild of Drapers and 6*d.* to the three poor of the parish (although the three poor were to pray for his soul) were good uses. This case was cited in *Adams and Lambert's Case*, p. 110, and appears to be overruled by it, so far as regards the gift to the poor who were directed to pray for the donor's soul.

The Dean of Paul's Case (4 Co. Rep. 109; Dyer, 368; Moor, 131). Land worth £14 per annum was conveyed to the Dean and Chapter of St. Paul's, to find a sustentation of 10 marks yearly for a priest and his clerk to sing mass every day for the donor's soul and all Christian souls in the church of St. Paul, and to find bread, wine, candles and other ornaments for divine service, and to pay 4*d.* a week to six poor men to pray for the soul of the donor and others, and the other profits to be employed for the yearly obit of the donor in the said church.

The obit was not kept within the time mentioned in the Act,

viz., five years, but the priest was, and received £6 13*s.* 4*d.* per annum; and it was held that the king took only the £6 13*s.* 4*d.* per annum. The gift to the poor men was treated as good, but this was also cited in *Adams and Lambert's Case*, and appears to be overruled by it.

The Case of the Swan and Bull (Duke, 93; 4 Co. Rep. 115). The swan was given to find an obit, and the bull to find a priest, and they were employed *vice versâ*. The king was held entitled to both.

Turner's Case (Moor, 131; 1 Anders. 100; 2 Sid. 46) (T. T. 1576). Land in London worth £4 6*s.* 8*d.* per annum devised upon condition to find an obit, spending thereat so much as the devisees would in their discretion. The devisees spent only 6*s.* 8*d.* per annum upon the obit:—*Held*, that the Crown took the whole land.

Colborn v. *Dale* (Moor, 653, 649; 1 And. 99; 2 Sid. 46) (T. T. 1578). Devise of houses in London worth £24 per annum, to find a priest to perform divine service in the church of E. for souls, and pay him £6 13*s.* 4*d.*, and find an obit with six priests, employing 22*s.* on it, part to be distributed among eight poor persons: and 16*d.* yearly to the parsons of E. for beading of beads; every Sunday 3*s.* 4*d.* to the friars of A. to pray for the testator's soul; 4*s.* yearly to the preacher at St. Paul's on Good Friday; to three preachers of the Spittle to commend his soul to the prayers of the people, 13*s.* 4*d.*; also 3*s.* 4*d.* to the wardens of the Company of Sheermen, to distribute among the poor almsmen of the same trade, to the intent that those of the wardens with eight or more of the said company upon warning should come to the obit; some small sums for keeping and taking accounts; and 11*s.* 4*d.* yearly for finding books, vestments, and ornaments of the chapel, where he appointed his obit to be celebrated:—*Held*, that the king took the houses, as all the uses were superstitious or dependent on superstitious uses.

Adams and Stokes' Case (4 Co. Rep. 116) (T. T. 1588). Devise on condition to find a priest, and that he should have for his salary £6 of the issues and profits of the land. Testator also

devised yearly for ever 13*s.* 4*d.* to the prisoners of Newgate and Ludgate at the day of his death to pray for his soul, besides the said sole priest, and the residue for repairs, and to augment the priest's portion:—*Held*, the whole given to the king, for the praying for souls by the prisoners, although out of church or chapel, was superstitious.

Whetstone's Case (4 Leon. 159; 1 Anders. 100; Moor, 130) (E. T. 1556). Lands were given to find an obit in a chapel appointing a certain sum for it, and the residue to be employed in repairing the chapel:—*Held*, all given to the king, for the one depended on the other. But a contrary decision is mentioned in this case, that one Draiton devised land in London to the Dean and Chapter of St. Paul's on condition that they should find two chaplains to pray for his soul in a chapel newly built there by him, and pay them for their salary £13 6*s.* 8*d.*, and find an obit, spending a certain sum upon it, and repair the chapel; and the decision was against the king. The decision against the king must have been as to the surplus.

Partridge v. *Walker* (Moor, 693) (H. T. 1595). Devise of houses in London to find an anniversary, spending on it 20*s.*, and to pay to the poor 5*s.* 6*d.* (=66*d.*) *in honorem et duplicationem annorum in quibus Christus vixit in terrâ.* And it was held that the land was not given to the king, for the payment of 5*s.* 6*d.* to the poor was a good use.

To these may be added *Adams* v. *Lambert* itself (4 Co. Rep. 104) (M. T. 1602). Feoffment to the use of will, and appointment by will, to B., that B. should during his life find a chaplain to celebrate daily in a certain church for certain souls, and pay him yearly £6 13*s.* 4*d.*, and find six poor persons to pray for the same souls every day for ever, and give them each 4*d.* a week and certain lodging; and keep a lamp always burning at a certain shrine; and keep his anniversary, burning two wax tapers thereat, and giving the ends of the tapers for the masses on feast days; and find one torch yearly for the aforesaid shrine. There were remainders to others for life, and in tail, and for years, upon the same trusts, and an ulti-

mate remainder to the testator's heirs, apparently upon the same trusts. It was held that the whole of the land was given to the king.

The following cases are also to be found reported:—

Skinners' Co. Case (Moore, 129) (M. T. 1582). Devise of houses in London, to sustain poor men decayed by misfortune or visited by the hands of God, who should dwell in the houses, with a direction to them to pray for certain souls; and a further trust to observe an annual obit and pay certain officials to be present, and to give 11 marks annually to a priest to sing for the souls, and 3*s.* 4*d.* for his robe; and to repair the houses with the rest of the profits. It was admitted that the Crown took as much as had been employed on the priest and the obit; but the decision was against the Crown on the rest.

It will be observed that this case is prior to *Adams* v. *Lambert*, and may be considered as overruled on the gift to poor men, coupled with a direction to them to pray for souls.

Hart v. *Brewer* (Cro. Eliz. 449) (M. T. 1595). Devise of houses in London to churchwardens to find an obit in the church of S., bestowing 3*s.* 4*d.* annually thereupon, and to repair the houses and to bestow the residue of the profits in repairing the church of S. and finding ornaments for it.

Held, that the Crown took only the 3*s.* 4*d.* per annum, for though the obit was to be in the church, yet the church was for divers other good purposes, and for these purposes the church ought to be repaired and have ornaments.

Duke, 108, B. 352, s. 14: "In Crook, part I., 180, 181, it is resolved that lands given to the maintaining of a priest to say mass, and he to have yearly £3 6*s.*, and that what shall be above shall go to the repairing of the church; that this is not given to the king by 1 Edw. 6, c. 14." That must mean the king took only the priest's stipend. This looks like an incorrect recollection of *Hart* v. *Brewer* (Cro. Eliz. 449).

Simons v. *Wenlock* (Cro. Eliz. 799) (M. T. 1600). A. had a lease of certain hereditaments for eighty years ending 34 Eliz., and a reversionary lease of them for a further period of ninety

years, and devised them on trust to pay £5 a year to a certain abbot and his successors, and £5 a year to a priest to sing for his soul, and subject thereto for his son. After the expiration of the first lease the plaintiff turned beasts on the land and the defendant impounded them, and the plaintiff brought replevin, and sought to set up the title of the Crown.

The Court expressed an opinion that a reversionary lease was not within the statute 1 Edw. 6, c. 14; and that the Crown could take nothing but the two sums of £5 each; also that the plaintiff, being a mere intruder, would not be aided by the Crown.

Wickham v. *Wood* (Duke, B. 473; Lane, 112) (T. T. 1611). Feoffment in Feb. 1509, upon trust for certain superstitious purposes, for ninety-nine years. In April, 1608, the representative of the surviving feoffee made a lease to the plaintiff, who brought ejectment against the defendant claiming under the grantee of the Crown, and recovered the land. The trusts during the ninety-nine years were to find a priest to say mass for souls. Other like trusts were declared after the ninety-nine years, but these were qualified by the condition "if it were then lawful." (Compare *Waldern* v. *Ward, infrà.*)

Bagnall v. *Potts* (Godbolt, 233) (M. T. 1613): "It was resolved, that if copyhold be given to superstitious uses, and the same cometh unto the king by the statute, that the copyhold is destroyed, and the uses shall be accounted void. But it was resolved, that in such case by the statute which giveth this land so given to superstitious uses to the king, that the king hath not thereby gained the freehold of the copyhold, but the same remaineth in the lord of the manor."

The meaning of this resolution is not clear. The 39th and 40th section of the Act, 1 Edw. 6, c. 14, except copyhold lands from forfeiture to the king, and leave them in the hands of their former owners. The decision here seems to be that the superstitious trusts are destroyed.

Simon Pits v. *James* (Hob. 121) (T. T. 1614). A hospital founded at D. by licence of King Richard II., for certain poor,

with one to be above the rest and to be called "minister of the house," and a direction that all the inmates should pray for certain souls:—*Held*, the whole property given to the king. There is a full statement of the facts and a long judgment in this case.

Simon Peter's Case (Duke, B. 133; B. 126): "King Henry 7 erected certain almshouses at W. for a certain number of poor people, whereof one should be a priest, who at certain times was to go about certain places and pray for the souls of the king and his ancestors. Now, although the gift to the poor might seem charitable, yet because it would not consist without a priest to pray for souls, which is superstitious, it was decreed in the Chancery (27 June, *Anon.*, 30 Jac. 1622), that it was no charitable use within the statute." (Obs. 30 Jac. is an impossible date, and this whole statement looks like an incorrect recollection of the case of *Simon Pits* v. *James* (Hob. 121)).

Waldern v. *Ward* (2 Sid. 13, 34, 46; 3 Salk. 335) (H. T. 1657). Feoffment to the use of will, and appointment by will to the Dean of Newark for an obit, and to pay the chantry priest of S. £7 per annum during the lives of his wife and sister to sing for certain souls, and afterwards to perform divine service for ninety-nine years, and then that the lands should be sold and the proceeds distributed for charitable uses for the aforesaid souls. The feoffees had made a lease for ninety-nine years, reserving £7 per annum to the chantry priest. Then the statute supervened. The lease expired in 7 Car. 1:—*Held*, that the fee was given to the king by the statute.

A.-G. v. *Vivian* (1 Russ. 225) (Aug. 1826). An ancient assurance to a parson and churchwardens directed them, amongst other things, to "find support and maintain for evermore a taper of wax of a pound weight to stand and burn before the image of our lady in the chancel of the said parish church at all divine service to be done and said within the same parish church in the honour of God, our lady, and all saints." On an information to overhaul the accounts of the property, it was

held that this was a superstitious trust, and that the information must stand over that the Solicitor-General might be brought before the Court to sustain the rights of the Crown.

The Stat. 23 Hen. 8, c. 10.

There is one other Act of Parliament of the 16th century, which ought to be noticed in this connection, although its effect on modern law is but slight.

The statute 23 Hen. 8, c. 10, recites, in effect, that by assurances of trusts of hereditaments to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties, companies, or brotherhoods, erected and made of devotion or by common assent of the people without any corporation, and also by feoffments, &c., and other Acts made to any uses aforesaid, or to the uses and intents to have obites perpetual or a continual service of a priest for ever, or for threescore or fourscore years, or by trusts to the same effect or to any other like uses and intents, prejudice arose similar to the prejudice caused by alienations in mortmain, and then enacts,

(Sect. 2) that all such uses, intents and purposes declared after March 1, 1531, shall be utterly void, and of no strength, virtue, or effect in the law.

Sect. 3, however, allows such dispositions to be made for terms not exceeding twenty years.

On this Act we may observe (1) that it only applied to assurances of hereditaments; (2) that it professes to be based on the policy of the Plantagenet Mortmain Acts; but (3) it did not give the Crown a right to seize the lands, but declared the use or trust void for the benefit of the donor or his heirs, so that no licence from the Crown would exclude the operation of the Act. Furthermore,

In *Martindale* v. *Martin* (Cro. Eliz. 288) (M. T. 34 & 35 Eliz. (1592)) it was resolved that a devise of land for a school and for five poor men was not restrained by the Act 23 Hen. 8, c. 10, for that was only to restrain superstitious uses, and never intended to restrain uses that were in favour of learning and the relief of the poor.

And the same conclusion was arrived at after elaborate argu-

ment in *Porter's Case* (1 Co. Rep. 16–26) (M. T. 34 & 35 Eliz. (1592)).

The result of these decisions has been that the statute has been regarded as almost a dead letter. All gifts for superstitious purposes, whether of land or any other property, and whether for ever or for twenty years, or a single payment, have been held altogether void on general principles, and if the Act was confined to such gifts, there was nothing left for it to operate upon. It will be found, however, that the statute is referred to in the judgment of Abbot, J., in *Doe* v. *Hawthorn* (2 B. & Ald. 102), but the observations upon it were not material to the judgment; and it is cited in *A.-G.* v. *Webster* (L. R. 20 Eq. 488) as shewing that a gift of land for the benefit of a parish would be void if not charitable; and that ground appears to be adopted by the judgment in that case.

Finally, the Act 23 Hen. 8, c. 10, has now been formally repealed by the Mortmain and Charitable Uses Act, 1888, but this repeal does not appear to make any real change in the law.

Cases since the Act 1 Ed. 6, c. 14.

We will now proceed to mention the cases which have been decided by the English Courts since the Reformation, in which gifts have been held void as being for superstitious purposes, or good notwithstanding that their validity was impugned on that ground. The number of cases is really remarkably small, but they warrant the conclusion that all gifts to any persons expressed to be to the intent that the donees shall perform or procure others to perform any acts for the supposed benefit of the soul or souls of any person or persons are void: *West* v. *Shuttleworth* (2 M. & K. 684) (1835); *Re Blundell's Trusts* (30 Beav. 360) (1861); *Yeap Cheah Neo* v. *Ong Cheng Neo* (L. R. 6 P. C. 381) (1875); and such a gift is not rendered valid by an expression that it is also given for other pious uses (*Heath* v. *Chapman*, 2 Drewry, 417 (1854)). But trusts to perform religious services, to study religious books, and to say prayers at intervals, are not deemed superstitious, on the ground that they are beneficial to those who perform the trusts, and, in the case of services, to all who take part in them (*Strauss* v. *Goldsmid*,

(8 Sim. 614) (1837); *In re Michel's Trusts* (28 Beav. 39) (1860). The question of gifts to religious orders will be dealt with in a separate chapter.

Superstitious use annexed to charitable gift.

In *Hynshaw* v. *Morpeth Corporation* (Duke, 69, B. 242) (1629), the Lord Keeper expressed an opinion that if land was given for a school, or to relieve poor, coupled with a direction to pray for the donor's soul, the latter direction would be disregarded as a mere accessory, and the charitable use would be good. But this *dictum* has not been followed in cases of gifts to priests and chapels with such a direction superadded (see *West* v. *Shuttleworth* (2 M. & K. 684) (1835)). Moreover, the decisions under the statute 1 Edw. 6, c. 14, went on a contrary principle (see *Adams and Stokes' Case* (4 Co. Rep. 116); *Sir B. Read's Case* (ibid. 113); *Caley's Case* (ibid. 114); and *Adams and Lambert's Case* itself (4 Co. Rep. pp. 109, 110)).

This *dictum* in *Hynshaw* v. *Corporation of Morpeth* is treated in Shelford on Mortmain as a point decided in the case. But it cannot have arisen in that case, as the charity in question was founded by King Edward VI.

Rex v. *Lady Portington* (1 Salk. 162) (1692). A testatrix devised land to the defendant and her heirs. The defendant was said to have admitted that this was done on a secret trust for the good of the testator's soul, and that the land was not the defendant's, but belonged to God and His saints; but there was no trust in writing. The nature of the proceedings is not very clear, but it is stated that an objection was allowed in the King's Bench on the ground that the trust was not in writing, and that an information was preferred in the Exchequer to obtain discovery in May, 1693, and it was held, (1) that writing was unnecessary on the ground that the Statute of Frauds did not bind the Crown; and (2) that the king was entitled to discovery, as it was his duty to see that nothing was done to the propagation of a false religion. It is also stated to have been resolved that the trust was superstitious and void, and that the land did not go to the heir, but should be disposed of by the king to some proper use. Besides this, it is stated in a report

Discovery ordered of secret trust.

headed *The King and Queen* v. *Lady Portington* (3 Salk. 334) (M. T. 1692), that the heir-at-law brought ejectment for the land, and failed on the ground that the law ignored trusts altogether, and no evidence of any secret trust could be admitted. The Chief Justice is said to have expressed an opinion that the heir, and not the Crown, took the benefit of a devise upon a superstitious trust, and to have advised the heir to apply to Parliament. According to more modern ideas the heir would have been entitled to file a bill in Chancery. It appears, however, that the Crown established its right to dispose of the land in the Exchequer, as above-mentioned, in 1693. If the trust was to promote a religion forbidden by law, then the Crown would have been entitled according to later cases; but if the trust was simply superstitious, then the heir should have taken. In either case a devisee would now be compelled to answer on oath as to any secret trust, and the Statute of Frauds would be no objection to the plaintiff's claim in a Court of Equity. (See some comments of Lord Hardwicke on these cases in *Addlington* v. *Cann* (3 Atk. 153)).

West v. *Shuttleworth* (2 My. & K. 684) (Ap. 16, 1835, Sir C. Pepys, M.R.), being after the legalization of the Roman Catholic religion. Testatrix gave several legacies to priests and chapels, adding, "Whatever I have left to priests and chapels, it is my wish and desire the sums may be paid as soon as possible that I may have the benefit of their prayers and masses." She also gave some other legacies to priests, adding "for the benefit of their prayers for the repose of my soul and that of my deceased husband G.," and she directed the remainder to be applied as her executors should "judge best calculated to promote the knowledge of the Catholic Christian religion amongst the poor and ignorant inhabitants of S. and W." It was held that the legacies to priests and chapels were void on account of the superstitious purpose attached to them; and that the amounts of those legacies went to the next of kin. But the gifts of the remainder was a good charity by reason of the Act 2 & 3 Will. 4, c. 115, relieving Roman Catholics from penalties.

It is possible that *West* v. *Shuttleworth* is overruled now as far as it gave the benefit of the void gift to the next of kin. See the cases in the chapters on Tombs and effect of failure.

Straus v. *Goldsmid* (8 Sim. 614) (Aug. 11, 1837, V.-C. Shadwell), being before the legalization of the Jewish religion. Gift by will as follows: "The remaining third of the above residue to be given to the rulers and wardens of the Great Synagogue in this city of London in the manner hereinafter mentioned; that is to say, the interest or dividends arising from this third to be every year on the eve of the Passover distributed at least among ten worthy men who have wives and children among whom there ought to be some learned man, to purchase meat and wine fit for the service of the two nights of Passover."

The report states that it was held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good. But the report appears to have been communicated to the reporter, and it is difficult to see how the decision could be based on the ground alleged, considering that Judaism had not at that time been brought within the Toleration Acts.

Heath v. *Chapman* (2 Drewry, 417) (22nd July, 1854) Vice-Chancellor Kindersley). A testator before his death transferred stock to trustees and declared trusts of it, which the Court held to be proved, though parol only, as follows: £25 a year, after G.'s death, in perpetuity to the church at M., near Venice, where Z. was buried, for masses and requiems for the souls of the testator and the said Z.; an annuity of £20 in perpetuity to the cathedral at Venice for masses and requiems for the souls of the testator and the poor dead, and for other pious uses: an annuity of £20 in perpetuity to the Roman Catholic church in Moorfields in London for the purpose of having masses and requiems performed for the benefit of the soul of the testator and the souls of the poor dead, and for other pious uses.

Gift for masses and other pious uses.

Held, all void as superstitious: and the annexation of other pious uses to superstitious uses did not save any part of it, for the testator would consider burning tapers, and dressing a figure

of the Virgin Mary, pious uses, though they would not be charities: and the residuary legatees were held entitled.

In re Michel's Trust (28 Beav. 39) (March 1860, Sir J. Romilly, M.R.), being after the legalization of the Jewish religion. A Jew left to his executors, in effect, £300 consols, on trust to pay the dividends to the parnosim or wardens of the congregation of O. in Little Poland for the time being, to be paid by them to three qualified persons, chosen by preference out of his family to learn in their Beth-Hammadrass or college two hours daily for ever, and on every anniversary of his death to say the prayer called in Hebrew "Candish." Learning in the Beth-Hammadrass meant studying the Old Testament and Talmud. The Candish was a short Hebrew prayer in praise of God and expressive of resignation to His will:—*Held*, a good charity, corresponding to a gift to have three persons paid to study the New Testament two hours daily, and say the Lord's Prayer once a year.

To study religion and pray at times,—good.

This case shews the limits of what is and what is not superstitious. The trust was really for the education of some Jewish teachers, whereby they would be enabled to teach others. It was in fact a trust for the promotion of the Jewish religion, and as it arose at a date after the legalization of the exercise of the Jewish religion in England, it would have been good in England.

The remarks made by Vice-Chancellor Kindersley in the above-mentioned case of *Heath* v. *Chapman* (2 Drew. 417), when compared with the Irish case of *Felan* v. *Russell* (4 Ir. Eq. 701), which will be mentioned below, and the cases on monastic orders, which will be found in a future chapter, may possibly have suggested the insertion of a clause (s. 1) in the Roman Catholic Charities Act, 1860, 23 & 24 Vict. c. 134, which we will now proceed to mention.

R. C. Charities Act, 1860.

This clause is in the following words:—

"No existing or future gift or disposition of real or personal estate upon any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic religion shall be

invalidated by reason only that the same estate has been or shall be also subjected to any trust or provision deemed to be superstitious, or otherwise prohibited by the laws affecting persons professing the same religion, but in every such case it shall be lawful for the High Court of Chancery, or any judge thereof sitting at chambers in exercise of the jurisdiction created by the Charitable Trusts Act, 1853, upon the application of Her Majesty's Attorney-General, or of any person authorized for this purpose by the certificate of the Board of Charity Commissioners for England and Wales, or for the said board upon the application of the person or persons acting in the administration of such real or personal estate, or of a majority of such persons, to apportion the same estate, or the annual income or benefit thereof, so that a proportion thereof to be fixed by such Court or judge or by the said board, as the case may require, may be exclusively subject to the lawful charitable trusts declared by the donor or settlor, and that the residue thereof may become subject to such lawful charitable trusts for the benefit of persons professing the Roman Catholic religion, to take effect in lieu of such superstitious or prohibited trusts as the said Court or judge or the said board may consider under the circumstances to be most just; and also that it shall be lawful for the Court or judge, or board, making any such apportionment by the same or any other order or orders to establish any scheme for giving effect thereto, and to appoint trustees for the administration of the several portions of such real and personal estate, according to the trusts established of the same proportions respectively, and to vest the estate to be so apportioned in the trustees so to be appointed."

The effect of this Act is that when a trust for a superstitious purpose or for the benefit of a prohibited religious order affects an undefined portion of property otherwise devoted to lawful Roman Catholic charitable purposes, no part of the trust fails altogether, but the part which would have failed under the prior existing law will be applied for some lawful Roman Catholic charity. It may be assumed that prior to the Act the property

would have been apportionable, and the part attributable to the superstitious or prohibited purpose would have failed. In these cases of apportionment, if the purposes indicated do not furnish a practical scale of apportionment, the Court divides the property equally among all the purposes mentioned. This Act does not affect gifts of defined amount to superstitious purposes or prohibited monastic orders.

Later cases.

Since the above-mentioned Act other decisions have been given, namely :—

Re Blundell's Trusts (30 Beav. 360) (Nov. 18, 1861, Romilly, M.R.). B. invested a fund in the names of certain trustees and directed the income to be paid in certain proportions to the priests of certain Roman Catholic chapels for ever, on condition that they annually celebrated and offered up certain masses for the repose of his soul. The fund was paid into court, and on petition it was held that the trusts were void, and that the fund devolved as part of the residue of B.'s estate.

And in *In re Fleetwood, Sidgreaves* v. *Brewer* (15 C. D. 596, 609) (May 3, 1880, V.-C. Hall) a gift of £10 for masses was held void.

Finally, we should notice a case shewing the application of these principles to a totally different set of facts, namely :—

Yeap Cheah Neo v. *Ong Cheng Neo* (L. R. 6. P. C. 381, 396), (July 28, 1875). A testatrix in Penang, of some form of Chinese religion, devised a house for the performance of religious ceremonies to her late husband and herself. The Georgian Mortmain Act does not apply to Penang, but the general principles of English law as to charities do apply :—*Held*, void on the same ground as trusts to say masses or repair tombs. Sir Montague Smith, in delivering the judgment of the Court, said : "Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this house bears a close analogy to gifts to priests for masses

for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own, was held in *West* v. *Shuttleworth* (2 M. & K. 684) not to be a charitable use, and although not coming within the statute relating to superstitious uses, to be void. It is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead, or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives. All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects."

The Act 1 Eliz. c. 24.

We have already mentioned that a question was raised on this subject of superstitious trusts by the Act 1 Eliz. c. 24. That Act has been regarded by text-writers and editors of statutes as merely retrospective, and on careful consideration it appears to be so. It may be well, however, to give some account of it, as being a more mature legislative enactment than the 1 Edw. 6, c. 14. It appears to have been first printed in the official issue of the Statutes of the Realm in 1819, where it is numbered c. 24 of the public Acts.

The first section recites that various religious houses have been founded and endowed since the death of King Edward VI., and vests the same and their endowments in the Crown. It gives to the Crown also all goods and chattels belonging to the houses or their rulers (s. 2), and contains a clause respecting the granting of pensions to the inmates of the houses (s. 4).

The 7th section gives to the Crown all past gifts made since the death of Edward VI., for priests to sing or say mass, or to find any obit, light or lamp, for years, life, or for ever, the Crown only taking the amount given for such purposes in each case. And the 8th section provides that when property is given on condition that the donee should pay any sum "to any priest or priests for to sing or say mass or for to pray for the souls of the dead, or to keep any obit, or to found, find or make any chantry or chantries of any priest or priests, or to find any priest

or priests for any of the said purposes," then the Queen and her successors should take the amount devoted to such purposes and the donee should enjoy the residue of the property.

The wording of this section is general, and a contention may therefore be raised that it applies to future as well as past gifts. We conceive, however, that this section is merely a qualification of the section which precedes it. The editors have so understood it, for they have appended to it a marginal note, as follows:—

"Where lands have been given on condition to maintain such priests, etc., the stipend, etc., for such priest shall be vested in the Crown."

The 9th section enacts that the statute shall not apply to gifts in or by any of the religious houses aforesaid to any schoolmaster, school, or scholars, or to be bestowed on poor people; and directs the Queen within a quarter of a year, by commission or otherwise, to see to the proper application of the same.

The 10th section excepts the Universities and certain other foundations from the Act, but gives the Queen a power over such institutions.

On this point we may further observe that Duke states that lands devoted to superstitious purposes after the statute 1 Edw. 6, c. 14, as well as before it, are by other statutes given to the king, but does not refer to the statute 1 Eliz. c. 14 (Duke, B. 350). But this statement by Duke was not adopted by the Courts, which held subsequent superstitious gifts to be simply void, as we have seen.

There is yet another statute of the date 1714–15, which should be referred to on this subject, namely, 1 Geo. 1, c. 50. That statute vested in the Crown all property thitherto devoted to certain Roman Catholic purposes, adding, "or to or for any other Popish or superstitious use or uses whatsoever." It did not affect subsequent gifts. Stat. 1 Geo. 1, c. 50.

With respect to the words used in some of these cases, it appears that an obit was a funeral ceremony performed for a deceased person, not only on the occasion of the burial, but also Obit.

at intervals afterwards, the most usual intervals being one month afterwards, called the month's mind, and the anniversary, also called the year's mind, or twelvemonth's mind.

Trental. A trental was a repetition of a mass for thirty days in succession.

Chantry. A chauntry is used for an endowment to provide a priest or priests to sing masses for the soul of the donor or founder and others; it is also used in architecture to denote a small chapel built over the founder's tomb, for the singing of such masses.

Mass. A full account of a mass may be found in the report of *A.-G.* v. *Delancy* (I. R. 10 C. L. 104).

Irish cases on superstitious uses. Before leaving the subject of superstitious trusts we ought to mention some very unsatisfactory cases which have been decided in the Irish Courts.

Felan v. *Russell* (4 Ir. Eq. 701) (June 4, 1842). A testatrix bequeathed the residue of her personal estate to W. R., "to be by him applied for such pious purposes and uses as should appear to him to be most conducive to the honour and glory of God and the salvation of my soul." This was held to be a good bequest; but the reasons of the decision are not given in the report. It will be seen that in *Heath* v. *Chapman* (2 Drewry, 417), mentioned above, V.-C. Kindersley did not regard "pious uses" as equivalent to "lawful charitable uses."

Read v. *Hodgens* (7 Ir. Eq. 17) (Nov. 17, 1844) (M. R. Ir.). A testator directed the residue of his estate "to be expended for masses for my soul's sake." An elaborate argument was presented on the invalidity of this trust, but the judge held it good on the authority of the next-mentioned case, which, till then, was unreported.

Commissioners of Charitable Donations and Bequests v. *Walsh* (7 Ir. Eq. 34, n.) (Nov. 10, 1823) (L. C. Ir.). A testator said in his will, "I desire three solemn masses to be offered for the repose of my soul, one on the day of my interment, the other two in a month and a twelvemonth's mind; at each of which I desire if possible to have thirteen clergymen to perform the rites accustomed on these occasions; to defray which I desire that

my executors may pay the sum of £50 into the hands of the then Roman Catholic clergymen of the chapel of M. for that purpose; as also the sum of £5 at each meeting, making in all the sum of £15 for the entertainment of the said clergymen." He also directed "£20 to be given yearly to a third clergyman for the attendance of this parish, for which he will I hope offer a weekly mass for the repose of my soul and the benefit of my son." All these legacies were objected to, but were nevertheless allowed; but the decree only is preserved. The judgment and the arguments are not recorded.

Brennan v. *Brennan* (I. R. 2 Eq. 321) (June, 1868) (M. R. Ir.). Bequest of £50 to the Roman Catholic priest of the district known as M., "on trust to have one-half expended in procuring masses to be celebrated for the repose of my soul and the soul of my late husband, and the souls of his and my relatives." And a further gift of £20 "to the priest of the parish in which I die for masses to be celebrated for the repose of my soul and the souls of my late husband, child, and relatives."

Held, both payable.

Dillon v. *Reilly* (I. R. 10 Eq. 152) (March 16, 1875, Sullivan, M.R.). This case is very shortly reported. There was a bequest of £400, to be invested and the income paid to D., Roman Catholic Primate of Ireland, and his successors for ever, upon condition that he and they shall celebrate twelve masses each for the salvation of my soul and the souls of my relatives.

D. died in the testator's lifetime, and C. succeeded him.

This bequest was held void.

There was another like bequest of £400, the income to be paid to the clergymen attached to the parish of P., "at the time of my death for ever therefrom upon condition that four masses each month shall be celebrated for the benefit of my soul and the souls of my relatives and the poor souls late of the parish of P., now suffering in purgatory":

Held, that the income of the £400 should be paid to the clergymen of the parish at the time of the testator's death and the survivors and survivor of them, and that after the death of

the survivor the £400 fell into the residue of the testator's estate.

The Irish Act (5 & 6 Vict. c. 82, s. 38) exempts from legacy duty all bequests for any purpose merely charitable. And in *A.-G.* v. *Delaney* (I. R. 10 C. L. 104) (Jan. 29, 1876) C. B. Palles held that gifts to Roman Catholic ecclesiastics to offer up masses for the souls of the testatrix and her brother were not merely charitable, and were liable to pay duty at 10 per cent.

Morrow v. *M'Conville* (L. R. Ir. xi. 236) (Ap. 1883). Testator directed part of the income of a long leasehold estate held for 999 years, to be given to the Roman Catholic clergy of the church at L. to say masses for the repose of his soul and the soul of his wife.

This was held void as a perpetuity.

Dorrian v. *Gilmore* (L. R. Ir. xv. 69) (Ap. 1884, V.-C. Chatterton). Bequest of residue to be invested and the income "to be equally divided between two priests, in case there be two priests officiating at the time of my decease, and such others who from time to time may be officiating as Roman Catholic priest or priests in the parish of K., in consideration of their saying two masses a week for the happy repose of my soul":

Held, altogether void as a perpetuity for a purpose not charitable, and, *semble*, the report of *Dillon* v. *Reilly* (I. R. 10 Eq. 152) is very imperfect.

CHAPTER VI.

On Gifts to Religious Orders and Private Societies.

Gifts to religious orders stand on a different footing from gifts to voluntary societies bound by no religious vows. In pre-Reformation times there is no doubt that such gifts were good, subject to the provisions of the Plantagenet Mortmain Acts respecting land. In post-Reformation times there could be little doubt that all such gifts would be considered bad, as long as such orders only existed in connection with the Roman Catholic religion, and all trusts for the promotion of that religion were illegal. On the removal of the illegality, a new question might have arisen. Were such gifts to be considered as being tainted with superstition, and void in consequence; or were they to be regarded as gifts for promoting religion, and, therefore, good charitable trusts? The Acts of Parliament removing the illegality seem to settle this point with respect to all religious orders of men bound by monastic or religious vows, by providing for the suppression of all such orders.

Monastic orders illegal before R. C. Relief Act.

The Roman Catholic Relief Act (1829) (10 Geo. 4, c. 7), in s. 28, recites as follows: "And whereas Jesuits and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein;" and in the same section proceeds to enact that every Jesuit and member of any such order, being in the United Kingdom at the time of the commencement of the Act, shall register himself within six months.

R. C. Relief Act suppresses monastic orders.

Sect. 29 enacts that if any such person shall afterwards come

into the United Kingdom he shall be guilty of a misdemeanour, and be sentenced to banishment for life; but

Sect. 30 makes it lawful for natural-born subjects to return and register themselves.

Sect. 31 provides that the principal Secretaries of State may license foreign persons, being members of such orders, to come within the United Kingdom.

Sect. 33 makes it a misdemeanour to admit any new member to any such religious order; and

Sect. 34 makes the new member guilty of a misdemeanour, and liable to banishment; and

Sect. 37 enacts that nothing in the Act shall extend to any order, community, or establishment of females bound by religious vows.

Trusts for monastic orders void.

All religious orders of men bound by monastic or religious vows are thus prohibited associations, and all gifts for the maintenance of such associations would be void on the general principles of law. This result is recognised by an Act of 1844, the statute 7 & 8 Vict. c. 97, s. 15, which, after authorizing gifts to the Commissioners of Charitable Donations and Bequests for Ireland for the maintenance of Roman Catholic clergy and their places of worship, provides that nothing therein shall render lawful any bequest or donation in favour of any religious order bound by monastic vows prohibited by the Act 10 Geo. 4, c. 7, or in favour of any member or members thereof. The English Act 2 & 3 Will. 4, c. 115, also contains a clause (s. 4) confirming the prohibition of monastic orders.

These statutes still remain unrepealed, and, as long as they so remain, the Courts of Law must give effect to them in any question between the members of any such order claiming a legacy under a testator's will and his residuary legatee or next of kin. It may be that the orders exist and flourish, that members come from abroad without any licence, and new members are admitted in the United Kingdom. The statute may never be enforced by the Crown, but it remains to decide rights between man and man.

We may further suggest that the reason for which Parliament prohibited these orders was that it considered them as tainted with superstition. That being so, any gift for their benefit would fall to the residuary legatee or next of kin, and would not be applied *cy-près* by the Court, or appointed by the Crown by sign manual.

Cases before R. C. Relief Act.

We may cite here the two following cases, which occurred prior to the Roman Catholic Relief Act:—

Smart v. *Prujean* (6 Ves. 560, 567) (Dec. 11, 1801, L. C.) Here the Lord Chancellor expressed his opinion that a legacy of £100 for such purposes as the superior of a convent or her successor should judge most expedient, being given in that character, was sufficient to shew that it was for a superstitious use. But the legacy failed from being in a document not properly incorporated into the will, and such a legacy would probably be held good now.

De Garcia v. *Lawson* (4 Ves. 433, n.) (July 3, 1798), being before the legalization of the Roman Catholic religion.

The following legacies were considered void: to each superior for the time being of the Benedictine monks of the South and North Provinces (establishments in this kingdom); to the English black nuns at Paris; to the establishment of the Benedictine nuns at Cambray; to the English Benedictine monks of ——, in Lorraine; to John Bolton, for the maintenance of a Roman Catholic minister for ever. A long argument took place on the right of the Crown to appoint, and the right of the residuary legatee and next of kin; but no decision was given, as the whole fund went in costs. It would be in accordance with the bulk of the cases, that the legacies void for superstition should go to the residuary legatee; but the legacy for a religion forbidden by law would come within the prerogative of the Crown. The gift to John Bolton would now be good, and probably also the gifts to the nuns; but the gifts to the monks would still be void.

We may add here that the invalidity of a gift for the benefit of a prohibited religious order ought not to affect the validity of

Gift on trust not avoided.

a gift to members of such an order, which is expressed to be given to them, not for the benefit of the order, but upon a separate charitable trust. The trust should not fail on account of a disability affecting the trustee.

This has been so held in Ireland (*Carbery* v. *Cox*) (3 Ir. Ch. 231) (April, 1852), where the Courts have given full effect to the prohibition of religious orders; and even held that gifts to members of an order for the repair or improvement of a church used both by the order and the public is a gift for the benefit of the order, and therefore void (*Sims* v. *Quinton*) (17 Ir. Ch. 43) (Jan. 1865); *Kehoe* v. *Wilson* (L. R. Ir. vii. 10) (Nov. 1880).

Irish cases.

In the Irish cases the residuary legatee, or other person claiming under the testator, has received the benefit of the failure of gifts to religious orders.

The cases are as follows:—

Carbery v. *Cox* (3 Ir. Ch. 231) (April, 1852, L. C. Blackburne). In this case a bequest of £20 yearly to the nuns of D. convent to provide clothing for the poor children attending their school was held good; and a bequest in the same words to the monks of S. was held good during the lives of the monks existing at the testator's death, and the survivors and survivor of them, and afterwards liable to be applied *cy-près*; but a gift, after the death of M. C., of £20 (a year, apparently) to the monks of Mount Melleray, to be appropriated to the improvement of the chapel of Melleray, was held void, on the ground that the abbot and principal of the monks died before M. C., and the Court could not recognise any right in his successor, or discover any general charitable purpose. "The case," said the Lord Chancellor, "seems to me to be one in which there is but one particular object; and as that cannot be answered, the residuary legatee must take."

Hogan v. *Byrne* (13 Ir. C. L. R. 166) (April, 1862, C. P.) Devise: "I will my house and garden, out-office, lawn, to monks named Christian Brothers, and £100 in order to pay their rent."

The Christian Brothers were a lay order under vows of

poverty and chastity and obedience, existing for educating the poor, their property being vested in a superior for that purpose. They had thirty-five establishments in Ireland, and seven in England, with from three to seven members in each. The property devised was about an acre and a quarter.

Held, that the testator intended to devise the land to the order as such, and not to the individuals who composed it, and therefore the devise was void as to the legal estate, and the heir was entitled to recover the land; but this decision was given without prejudice to the question whether the land was affected with a charitable trust.

Sims v. *Quinlan* (17 Ir. Ch. 43) (Jan. 1865, L. C. Brady and L. J. Blackburne, varying the M.R. (16 Ir. Ch. 191)).

Bequest: "I bequeath £500 to the Rev. R. W. and the Rev. B. T. R. of St. S. Church or the survivor of them, to be applied as they shall deem best for the maintenance and education of two priests of the order of St. Dominick in Ireland.

"I bequeath £500 to the Rev. P. T. Conway of St. M.'s Priory, Cork, Roman Catholic clergyman."

Mr. Conway admitted that the gift to him was bound by a secret trust for its application in or towards redemption of a rent of £60 on St. M.'s Church, Cork, which was vested in himself and others as trustees, all the trustees being Dominican monks, and was used as one of the ordinary Roman Catholic Churches in Cork. All members of the Dominican order were bound by monastic vows:—*Held*, that the gift for the maintenance and education of Dominican monks was made void by the statute 10 Geo. 4, c. 7, as shewn by the statute 7 & 8 Vict. c. 97, s. 15; and that a fund so given was not liable to be applied *cy-près*. And that the gift of the second sum of £500 was void on the authority of *Carbery* v. *Cox* (3 Ir. Ch. Rep. 235). The Court therefore regarded the last-mentioned case as deciding that a gift for the benefit of the place of worship of a monastic order was void, although such place was also used for public worship.

Gifts to churches used by monks and public.

Walsh v. *Walsh* (I. R. 4 Eq. 396) (June, 1869, V.-C. Chat-

terton). Bequest of £30 for the use of the Franciscan convent of Wexford. This gift was held clearly void; and the report does not state the nature of the convent; but the word Franciscan appears to connect the institution with one of the prohibited orders.

Kehoe v. *Wilson* (L. R. Ir. 7 Ch. 10) (Nov. 1880, V.-C. Chatterton). Bequest of £500 to K. or the superior for the time being of the Franciscan order, Merchants' Quay, to be by him expended in the maintenance or repair of the Roman Catholic Church of Adam and Eve, Merchants' Quay, or in acquiring the fee of the ground whereon said chapel is built; £200 to R. O. or the Provincial for the time being of the order of Capuchins, Church Street, to be by him expended on building the new Roman Catholic Church at Church Street; and a like gift to the Provincial of the Augustinians, John Street:—*Held*, all void, as being for the benefit of the monastic orders.

"If the legacies had not been given, these monks would have to provide the money for the chapels out of their own funds. The principal objects are the monks of those orders, though the public are meant to worship in these chapels."

Liston v. *Keegan* (L. R. Ir. ix., 531) (Jan. 1882, M.R. Ir.). Bequest of residue to the Rev. N. B. of Phibsborough Roman Catholic church in the county of Dublin. It was proved that N. B. took it upon a secret trust for the church; that the church was a church belonging to the Vincentian order, and that all members of that order were bound by monastic vows of poverty, celibacy, and obedience. The bequest was held void.

In *Murphy* v. *Cheevers* (L. R. Ir. xvii., 205) (Dec. 1885), a gift to the Christian Brothers at Cork was held void on the ground that they were a monastic order, although evidence was given that they devoted themselves entirely to the gratuitous education of boys. The V.-C. distinguished a case of *Heron* v. *Donnellan* stated in Hamilton on Charities, p. 100, where he held good a bequest to a school attached to the community.

We have hitherto spoken of orders of men bound by monastic or religious vows within the meaning of the Roman Catholic

Relief Act, 1829. Other orders stand on a totally different footing. There is no statute forbidding them; they are merely voluntary associations. On any question being raised on a gift to one of them for the purposes of the order, the Court would inquire what purposes the order had. If the purposes were charitable the gift would be a charitable trust: *Henrion* v. *Bonham*, O'Leary on Charities, 90 (c. 1846); *Cocks* v. *Manners* (1871) (L. R. 12 Eq. 574); *Mahony* v. *Duggan* (1880) (L. R. Ir. xi. 260); *In re Wilkinson's Trusts* (1887) (L. R. Ir. xix. 531), like a gift to any voluntary charitable association not calling itself a religious order: *Spiller* v. *Maude* (1881) (32 C. D. 158, n.); *Pease* v. *Pattinson* (1886) (32 C. D. 154). If the order had no charitable purposes (*Cocks* v. *Manners* (1871) (L. R. 12 Eq. 547)), or the gift were made for the benefit of the members (*Stewart* v. *Green* (1871) (5 Ir. Eq. 470), it would resemble a club, and a gift to members of it would be a private gift, resembling a gift to a club, for the benefit of its members. In the latter case, the gift of a sum immediately payable would be good, if so given as to be at once distributable by the members of the club: *In re Delany's Estate* (1882) (9 L. R. Ir. 226); but a gift of property to be for ever devoted to the use of the members from time to time would be void as a perpetuity: *Carne* v. *Long* (1860), (2 De G. F. & Jo. 75); *In re Clark's Trust* (1875) (1 C. D. 497); *In re Dutton* (1878) (4 Ex. D. 54); *Kehoe* v. *Wilson* (1880), (L. R. Ir. vii. 10); *Morrow* v. *M'Conville* (1883) (L. R. Ir. xi. 236); *In re Sheraton's Trusts* (W. N. 1884, 174), like a perpetual gift for any other private purpose (*Thomson* v. *Shakespeare* (1859) (John. 612)). In the last-mentioned case, however, the gift might be good for the life or lives of the first taker or takers, if it were expressed so that the gift to them could be clearly separated from the residue of the perpetual disposition: *Stewart* v. *Green* (1871) (5 Ir. Eq. 470).

Gifts to religious orders not bound by vows.

And private societies.

A gift on condition that the donee shall join a lawful society, is good; but it may be questionable whether a gift to a woman on condition of her becoming a nun, is good (*Duddy* v. *Gresham* (1878) (2 L. R. Ir. 1)).

Cases on such gifts.

These conclusions are drawn from the following cases:—

Henrion v. *Bonham* (O'Leary on Charities, 90; Sugden, L.C., possibly January, 1835 or 1841–July, 1846).

Bequest "to be handed over to a certain religious society of ladies at Kilkenny called the Sisters of Charity, to be laid out by them in their usual charitable manner":

Held, that the legacy should be paid to the ladies, twelve in number, who composed the society at the death of the testator. Of course they took it on a charitable trust.

Thomson v. *Shakespeare* (Johns. 612) (Dec. 1859, V.-C. Wood) (affirmed Jan. 1860, L.C. Campbell, and L.JJ. Knight, Bruce and Turner) (1 De G. F. & Jo. 399).

Certain individuals had bought Shakespeare's house, but had not devoted it to any public purpose. The testator had given £2500 to be invested to keep it in repair. He bequeathed to his executors a further sum of £2500 "to be laid out by them as they shall think fit, with the concurrence of the trustees of Shakespeare's house already sanctioned by me in forming a museum at Shakespeare's house in Stratford, and for such other purpose as my said trustees in their discretion shall think fit and desirable for the purpose of giving effect to my wishes. I direct, moreover, that out of the rents of the Langley Priory estate the sum of £30 half-yearly, on the 24th of June and 24th of December of each year following my decease, be applied to the wages of a keeper or guardian whose duty it shall be to reside at Stratford-on-Avon, near Shakespeare's reputed birth-place, attend the visitants, and offer them a bound-up volume with pen and ink to inscribe, on certain conditions, such lines in verse or prose as the fancy of each visitant may induce to write; and I will that this half-yearly payment be a rent-charge for ever on the said estate":

Held, that inasmuch as the house was private property, and the museum was intended to be perpetual, the trust for a museum could not be carried out and was void; that the trust for such other purpose as the trustees should think fit was void for indefiniteness; and the gift of £60 per annum was also void as a private perpetuity.

Carne v. *Long* (2 De G. F. & J. 75) (May, 1860, L.C. Campbell).

Testator disposed of his property for the benefit of his wife for life, adding: "And from and after the decease of my said wife I give and devise all that my freehold mansion-house and premises called The Abbey, situate in Penzance aforesaid, with the appurtenances thereto belonging, unto the trustees for the time being of the Penzance Public Library, to hold to them and their successors for ever, for the use, benefit, maintenance, and support of the said library."

The library was in fact a club, to which admission was gained by an election by ballot, and the members paid yearly subscriptions. It was intended to continue, and one of the rules said it should not be broken up as long as ten members remained:

Held, void as a perpetuity for the benefit of private individuals.

Cocks v. *Manners* (L. R. 12 Eq. 574) (July, 1871, V.-C. Wickens).

Testatrix left the residue of her personalty, comprising pure and impure personalty, as to part to the Dominican Convent at Carisbrook, payable to the superior for the time being, and as to other part to the sisters of the charity of St. Paul, at Selley Oak, payable to the superior thereof for the time being.

The convent was an institution of Roman Catholic females living together by mutual agreement in a state of celibacy, and under a superior, for the alleged purpose of sanctifying their own souls by prayer and pious contemplation within their institution, and without performing external works or providing for public worship, or engaging in education, or receiving or visiting the sick, or poor, or indigent, or children. The superior stated that by the religious obligations of poverty the members of the convent could not of their own accord divert their funds to any other purpose than that of the community:

Held, not charitable, nor a perpetuity, but a gift to the members as private individuals. "When the superior receives it, she will be bound to account for it to the convent, to put it,

so to speak, in the common chest; but when there it will be subject to no trust which will prevent the existing members of the convent from spending it as they please."

The sisterhood was an institution of Roman Catholic women living together by mutual consent, with various branches, its primary object being stated to be the personal sanctification of the members, who employed themselves principally in teaching the children of the poor and nursing the sick, and in acquiring the requisite skill and knowledge for these purposes:

Held, that this was a charity, and the gift was good as to the pure personalty, but void as to the impure.

The Vice-Chancellor evidently considered the latter gift in this case to be made for the purposes of the order, and it may be distinguished from the next by considering a gift to an order as made for the purposes of the order, unless it is expressed to be made for the benefit of the members.

Stewart v. *Green* (5 Ir. Eq. 470) (Nov. 15, 1871, Lord O'Hagan and Christian, L.J.).

Gift of two-thirds of the ultimate residue of the rents of certain hereditaments to "E., superioress of the community of ladies professing the Roman Catholic religion residing in the town of B., and known or called by the name of the Order of Mercy, and to the superioress for the time being of the said order who should be resident in B., to be used, administered and applied by her as such superioress for the use and benefit of the said community of the Sisters of the Order of Mercy."

The order was united under rules for solely charitable purposes. The Vice-Chancellor held the trusts good for the lifetime of E., but declared them void afterwards. E. appealed from this judgment, and contended that the gift was charitable and good for ever:

Held, that the judgment should be affirmed, on the ground that the gift was not expressed to be for the charitable purposes of the order, but for benefits of the members of the order; and the members of the order might lawfully any day alter their rules, and discontinue their charitable works.

In re Clark's Trust (1 C. D. 497) (Dec. 21, 1875, V.-C. Hall). Testator gave £500 to the trustees of the Ringwood Friendly Society upon trust to apply the income thereof in aid of the funds of the society.

The legacy was paid and invested, and eventually transferred to the official trustees of charitable funds. Then the society was dissolved.

The effect of the rules of the society was stated by the judge to be: "The society was one whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. Poverty of the member at the time of his sickness or lameness, or in his old age, was not required to entitle him to an allowance":

Held, that this was not a charity, and the fund would not be applied *cy-près*, but went to residuary legatee; and *semble*, the gift was void *ab initio* as creating a perpetuity as in *Carne* v. *Long* (*suprà*).

Duddy v. *Gresham* (2 L. R. Ir. 1) (Feb. 1878, Q. B. D.). Testator gave all his property to his wife, adding "on the condition that my said wife shall retire immediately after my death into a convent of her own choice." The wife survived him some seventeen months and did not retire into a convent. The testator's heir claimed the real estate against the wife's devisee. It was held that "retire into a convent" meant "go to live in a convent," and did not imply the taking of any vows, and that the condition was good, and the testator's heir could recover.

In re Dutton (4 Ex. D. 54) (Dec. 4, 1878, Kelly, C.B., and Huddleston, B.). Testator gave the residue of his estate, which was all pure personalty, "to the trustees for the time being of the Tunstall Athenæum Mechanics' Institution, to be applied by them towards the building fund in connection therewith." The institution was founded for the purpose of supplying a library of reference, a circulating library and a reading-room, and for holding public lectures and educational classes. The only building fund was a sinking fund for paying off a mortgage on the institution which was incurred in raising money to build

the institution on land purchased by its trustees out of the funds of the institution:

Held, by Kelly, C.B., that the gift was void for creating a perpetuity, being an increment of the capital of a permanent institution and not coming under the control of the members as part of the annual income:

Held, by Huddleston, B., that it was rendered void by the Literary and Scientific Institution Act (17 & 18 Vict. c. 112, s. 30).

Obs.—It was assumed in this case that the institution was not a charity, but it may be doubted whether the effect of the Act mentioned ought not to be considered as making all such institutions charities, as it aims at making them perpetual. This view is supported by the case of *In re Christchurch Inclosure Act* (38 C. D. 520) (C. A. March 12, 1888, reversing Stirling, J., 35 C. D. 355), where a perpetual trust for the occupiers of certain cottages was held to be a charity.

The Stat. 17 & 18 Vict. c. 112.

It will be well to state here the principal provisions of the statute 17 & 18 Vict. c. 112. This Act has the short title, "The Literary and Scientific Institutions Act, 1854" (s. 35). The 33rd section enacts that "the Act shall apply to every institution for the time being established for the promotion of science, literature, the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs; provided that the Royal Institution and the London Institution for the advancement of literature and the diffusion of useful knowledge, shall be exempt from the operation of this Act."

The earlier sections of the Act authorize grants of land to be made for such institutions, including grants in fee simple by tenants for life in some cases (s. 1); and s. 14 expressly provides that the death of the donor within twelve months shall not avoid the gift. The 29th section authorizes the dissolution of

any such institution, and the 30th provides for a *cy-près* application of any surplus assets, unless the institution was in the nature of a joint stock company.

Cases continued.

Mahony v. *Duggan* (L. R. Ir. xi., 260) (March 1880, M.R.) There was a bequest of £2500 to trustees with the view of establishing a convent of the order of the Good Shepherd for the purpose of reclaiming fallen women in the city of C., with a gift over if such a convent should not be established in the lifetime of the trustees. Such a convent was established, and the bequest was held a good charity. The money was directed by the will to be paid to the superioress of the convent, to be disbursed by her for the maintenance and support of the convent in such manner as she should think proper.

Kehoe v. *Wilson* (L. R. Ir. 7 Ch. 10) (Nov. 6, 1880, V.-C. Chatterton). Testatrix bequeathed to H. or the guardian for the time being of the third order of the Franciscans, Merchants' Quay, the sum of £100 to be invested and the interest applied in having masses said for the benefit of the members of the said third order (of whom the testatrix was one), such masses to be celebrated in Ireland in a church open for public worship at the time of such celebration. The third order of Franciscans consisted of laity not bound by monastic vows:

Held, that the purpose of this legacy was not a public one, but a private one for the benefit of the order, and that it failed on the ground of perpetuity.

It will be observed that the purpose expressed in this case was saying masses for the members of the order, and not for the souls of the departed members. The case is therefore an authority on trusts for the performance of private religious services, as opposed to public ones, and it holds such a bequest void though coupled with a condition for admission of the public.

Spiller v. *Maude* (5 N. R. 30; 13 W. R. 69) (Nov. 1864, Romilly, M.R.). A York Theatrical Fund Society was established in 1815, and received subscriptions from members and gifts from others. By the rules, only actors could be members,

and the objects were to provide for the funerals of indigent members, for the relief of orphan children of members, the supply of medical advice and medicines to poor sick members, and granting annuities to poor members disabled by age or accident. In 1832 the society was registered under the Friendly Societies Acts. In 1864 only one member was left, and she claimed to be entitled to all the funds, amounting to £1300 New Threes. Lord Romilly held that she was only entitled to the income during her life, and expressed an opinion that the *cy-près* doctrine would be applicable at her death, at least to the extent of so much of the fund as had arisen from donations.

The fund was then paid into Court, and after the death of the plaintiff a petition was presented asking for a *cy-près* application of the fund.

This petition was heard by Jessel, M.R., in July, 1881 (see 32 Ch. D. 158, n.). He held that poverty was an ingredient in the qualification of members to be recipients of the benefits of the society. That it was therefore a charity, and the whole fund was applicable *cy-près*, as the particular objects had failed. He authorized the transfer of the fund to the Royal General Theatrical Fund Association.

In re Delaney's Estate (9 L. R. Ir. 226) (March 1882, C.A.). Testator devised lands "to the use of the most Rev. W. D., Roman Catholic bishop of Cork, or other the Roman Catholic bishop of Cork for the time being, in trust for the sisters of mercy at Bantry." He also gave a legacy of £1000 "to the most Rev. W. D., bishop of Cork, or other the Roman Catholic bishop of Cork for the time being, to be applied by him for the benefit of the convent of mercy at Bantry, the good sisters of which are requested to apply the same in and to such charitable purposes as they deem most useful."

The validity of the legacy was admitted, but the heir contested the devise. It was held that the devise, like the legacy, was a gift to the bishop at the testator's death on an immediate and not a perpetual trust for the sisters at the testator's death, and therefore valid as a private gift. It was also in evidence

that the society existed solely for charitable purposes; and that being so, it was intimated that if the gift had been a perpetual trust it would have been good as a charity.

Morrow v. *M'Conville* (L. R. Ir. xi. 236) (Apr. 1883). Testatator directed part of the income of certain property to be applied to the use and benefit of the Roman Catholic convent at L. The property was leasehold for 999 years. This was held to be void as a perpetuity, and not a charitable gift.

In re Sheraton's Trusts (W. N. 1884, 174) (July 19, 1884, V.-C. Bacon). Testator bequeathed to the rector for the time being of S. £800, the interest of which he directed should be paid to the trustees for the time being of the S. Mechanics' Institution, to be applied by them for the benefit of the institution in such manner as they should consider most advantageous for the instruction and benefit of the members of the said institution. He directed the £800 to be paid out of such part of his personal estate as might be lawfully appropriated to such purpose.

The full name of the institution was the S. Mechanics' Institute of Literature and Science.

The residuary legatee claimed that the gift was void as a perpetuity, and it was so held accordingly.

The report does not state further the objects and constitution of the institution, but it may be assumed that they were partly social, for the benefit of the members of the institute.

Pease v. *Pattinson* (32 C. D. 154) (Feb. 1886, V.-C. Bacon). A fund had been raised for the relief of sufferers from a colliery accident in 1862, and proving more than sufficient, the surplus had been divided into twelve parts, and with the express or tacit consent of the subscribers paid to committees for the relief of suffering caused by colliery accidents in twelve districts. A sum of £2320 had been paid to such a committee in the South Durham district. The surviving member of this committee wished to hand over the fund to the trustees of a Friendly Society of Miners in the four northern counties.

The Vice-Chancellor held that the fund was devoted to a particular charitable object, which had not failed, and that no case

for the *cy-près* doctrine arose. He, in effect, appointed the trustees of the society to be new trustees of the fund, and directed it to be applied exclusively to the relief of suffering caused by colliery accidents in the South Durham district. He also held that the consent of the Charity Commissioners was not necessary to the application.

In re Wilkinson's Trusts (L. R. Ir. xix. 531) (Aug. 1887, C. A.). Bequest of £1000 "to S., superioress of the convent of mercy at K., county Clare, to and for the purposes solely of said convent, or to such other person as may be superioress of said convent at the time of my decease."

Evidence was given to shew that the purposes of the convent were entirely charitable:

Held, that the gift was good, whether the purposes of the convent were charitable or not.

CHAPTER VII.

On Gifts for Erecting and Repairing Tombs.

We will now consider trusts for erecting a tomb to a testator, keeping his tomb in repair, or keeping in repair some one else's tomb.

The conclusions which we deduce from the cases mentioned below are as follows :—

Trust to erect monument good

(1.) That a trust to erect a tomb or monument to a testator operates as an authority to the executor to lay out the money in that way; and if he does not so lay it out, the residuary beneficiary gets the benefit of the sum saved. If the estate was being administered by the Court, the Court would probably apply it at the instance of either the residuary beneficiary, or the executor. But if the estate was not before the Court and the executor did not apply it, the residuary beneficiary could hardly take any steps to compel the executor to perform the trust, when the executor might meet his action by saying, "Here is the money, take it, and apply it yourself": *Trimmer* v. *Danby* (1856) (25 L. J. Ch. 424).

(2.) A trust to erect a tomb or monument is not impeachable for unreasonableness on the ground of the magnitude of the sum authorized to be laid out upon it: *Mellick* v. *The President and Guardians of the Asylum* (1821) (Jac. 180); *Trimmer* v. *Danby* (1856) (25 L. J. Ch. 424).

if incumbent consent,

(3.) If the tomb or monument cannot be erected without the consent of the incumbent of the church, and such consent is refused, the trust cannot be carried out, and the residuary beneficiary gets the benefit of it (*Mellick* v. *The President, &c., of the Asylum* (1821) (Jac. 180)).

not a charity.

(4.) As the erection of a tomb or monument is not a charity, the proceeds of land or impure personalty may lawfully be authorized to be applied for this purpose.

The residuary beneficiary will therefore be the next of kin, heir-at-law, or residuary legatee or devisee, according to the circumstances; and sometimes the residuary beneficiary will be the person taking the residue of some particular property.

Trust to repair tomb void

(5.) A trust to keep in repair the tomb of the testator, or of anybody else, or a family tomb, outside of a church, is void, as being a trust which does not confer a benefit on anybody at all.

It has been suggested (*Lloyd* v. *Lloyd*, 1852) (12 Sim. N. S. 255) that such a trust may be good for the limits fixed by the rules of perpetuities; but on consideration it will be seen that there would be no person who could enforce such a trust. The Attorney-General could not enforce it, for it is not a public trust; and no private individual derives any benefit from it. A trust to repair a tomb within those limits might perhaps operate to authorize the trustee to apply the money in that way if he so thought fit, like a trust to erect a tomb; and if he did not so apply it might be given to some other person.

unless in a church.

(6.) A monument or mural tablet in a church has been held to be an ornament of a church, so that it is for the benefit of the congregation worshipping there that it should be kept in repair; and a trust to keep one in repair is therefore a charity, as are all trusts for keeping up the ornaments of churches: *Hoare* v. *Osborne* (1866) (L. R. 1 Eq. 585); *Re Rigley's Trusts* (1866) (15 W. R. 190)).

Trust to repair churchyard, good.

(7.) A trust to keep a churchyard in proper order is a good charity, as a public benefit is thereby conferred (*Vaughan* v. *Thomas*, 1886) (33 C. D. 187).

The following is a list of cases on tombs arranged in chronological order:—

Cases on tombs.

Masters v. *Masters* (1 P. Wms. 424) (1718, M. R.) Testatrix gave £200 for a monument for her mother. It was decreed that this sum should be laid out accordingly. Priority

was also given to this bequest over other legacies to individuals and charities, apparently in view of the fact that the testatrix received the bulk of her property from her mother, so that the erection of a tomb was a sort of debt or duty. The latter point is clearly not law now.

Durour v. *Motteux* (1 Ves. Sen. 320) (Nov. 21, 1749, L. C. Hardwicke). A testator, by will made in 1745, directed a fund to be invested in land, and the income to be applied for certain charitable purposes, and to pay £10 a year to a minister to preach a sermon once a year to his memory, to keep his tombstone in repair and the inscription thereon and upon a stone against the wall reciting the gift, and £2 per annum to the clerk, and £2 per annum to the sexton, and £4 per annum to the mayor, &c., of A., to keep an account of the same:—*Held*, that the gift to the minister was void under the Georgian Mortmain Act as a charitable use; and that the following trusts were void as circumstances attending the general execution of a void trust. The sum directed to be invested sank into the general residue of the personal estate. (See the will more fully set out 1 Sim. & Stu. 292.)

This case leaves the question open whether a gift of pure personalty to provide an annuity for the minister of a particular church, with like conditions added, would be good or bad. On principle it would seem to be bad. A trust to keep a tomb in repair being void, a condition to the same effect annexed to a gift ought to render the gift void, as is the case with conditions to pray for souls.

Gravenor v. *Hallum* (Amb. 643; March, 1767, L. C. Camden). A testator charged land with payment of £10 per annum, and gave thereout two sums of 20*s.* a year each to the churchwardens of two parishes for ever, to be laid out in repairing his family vaults in each of these parishes. The report makes the Lord Chancellor say that the gifts of these two sums of 20*s.* are void at law, because made to churchwardens who were not a corporation; and being so, "a Court of Equity will not appoint new trustees to set them up." In the next paragraph he is made to

add that, "though the churchwardens could not take, yet the devise is good, and the heir-at-law is a trustee."

According to modern decisions the gift of these sums would be clearly void.

Doe d. *Thompson* v. *Pitcher* (3 M. & S. 407) (Jan. 1815, Lord Ellenborough, C.J.). A deed duly enrolled conveyed land for a Quakers' meeting-house, which was a good charity, with a condition for keeping up a vault for the donor and her family:—*Held*, that this was not such a reservation for the benefit of the donor as made the deed void under the Georgian Act.

Family vault, *infrà*, 87.

N. B.—This case and the preceding one are cited in Jarman on Wills, 3rd ed. i., 194, in favour of the proposition that a gift for keeping up a vault for the donor's family is a good charity; but the judgments have to be much strained to get this result out of them. And if they ever established that proposition, it has certainly been overruled by later cases. The gift in *Gravenor* v. *Hallum* does not appear to have been treated as a charitable gift. It is also probable that the decision in *Doe* d. *Thompson* v. *Pitcher* (3 M. & S. 407) (Jan. 1815) was reversed on appeal, for it is stated in *Doe* d. *Thompson* v. *Pitcher* (6 Taunt. 359) (Nov. 1815) that the heir had recovered that portion of the land which was subject to a charitable trust.

Limbrey v. *Gurr* (6 Madd. 151) (July, 1819, V.-C. Leach). A trust in a will to erect a monument to the testator held good.

Mellick v. *The President and Guardians of the Asylum* (Jac. 180) (Aug. 1821, Sir T. Plummer, M.R.). Testator desired to be buried at A., directed £2000 out of his land to be applied to erecting a monument to him there, gave £200 to Dr. Samuel Johnson to write an epitaph for it, and twenty guineas to the rector for his consent; the monument to be begun at once and finished within a year. The residuary personalty given to the defendants with a trust to keep up the monument:—*Held*, the erection of a monument not a charity, but like an expensive funeral. It failed, however, for want of the rector's consent. Another rector, thirty-seven years afterwards, gave his consent;

but that was held too late; and the fund, which had been set apart, was paid to the heir-at-law.

Jones v. *Mitchell* (1 Sim. & Stu. 290) (Feb. 1823, V.-C. Leach). A trust to invest £60 out of the proceeds of real estate on trust to keep in repair certain family vaults or tombs was allowed to go uncontested apparently.

Baker v. *Sutton* (1 Keen, 224) (May 7, 1836, Lord Langdale, M.R.). Trusts to repair tombs of the testator and his parents, and a tablet on a church wall, and gifts to the clerk and a minister in respect thereof, all held void; but on the alleged ground of the Georgian Act. They were mixed up with clearly charitable trusts, and a sum was directed to be invested on mortgage to provide for them; and the attention of the Court was not called to the question whether they were charities or private matters.

Willis v. *Brown* (2 Jur. 987) (Nov. 1838, V.-C. Shadwell). A trust to apply £10 a year in repairing a monument and a surplus in charity had been declared void under the Georgian Act owing to the nature of the property. An application to declare the trust good as to the monument was opposed on the ground that it was a charity, being for the ornament of the church:—*Held*, not a charity, and the declaration must be altered as to the monument. But this case is certainly overruled now.

Mitford v. *Reynolds* (1 Phillips, 185) (Nov. 1841, and Dec. 1842, L. C. Lyndhurst). Testator, by clause 8 in his will, directed his executors as follows: "To purchase and prepare for the ultimate deposit of my body, and also for the removal and deposit of the remains of my parent and sister now lying interred in a vault in the churchyard of C., the mount that is contiguous surrounded by a moat, which I understand to be the property at present of Mr. E., on the summit of which they will be pleased to cause the construction of a suitable and handsome, as well as durable, monument, fronting the summit and sides of the mount with cedar and cypress trees, in a manner that may render it ornamental to the town." By clause 9 he gave the residue

of his estate for a purpose which was held to be a charity to which he might lawfully devote all his property:—*Held*, that the 8th clause was sufficiently definite for the amount to be ascertainable; and that, assuming it to be void, it did not invalidate the gift of the residue.

An inquiry was then directed to ascertain the amount required for clause 8, and the master found that £1269 8*s*. was required (16 Sim. 109); and a further inquiry was afterwards added as to whether the owner of the mound would sell it (1 Phillips, 706) (June 1846). It was found that the owner would not sell the mound, so that clause 8 failed on a point of fact, supposing it to be valid in law. The next of kin then reargued the point already decided, and claimed the whole residue; but it was held that the £1269 8*s*. fell into the residue, and that the whole went to the charity (*Mitford* v. *Reynolds* (16 Sim. 105) (Feb. 1848, V.-C. Shadwell)). The 8th clause of this will directed the expenses thereof to be provided "from the surplus property that will and may be found after the payment and discharge shall have been made of the above legacies and bequests." The 9th clause began with the words, "I will, devise, give and bequeath the remainder of my property of whatsoever kind and description, and that may arise from the sale of my effects." These words in the 9th clause were held to constitute a true residuary gift, carrying the benefit of all prior gifts which failed.

Adnam v. *Cole* (6 Beav. 353) (June, 1843, Lord Langdale, M.R.). Testator directed his trustees to lay out his residue in erecting such a monument to him as they should think fit, and putting up a gallery and an organ in a certain church. They laid out the whole on a monument:—*Held*, wrong. The residue should be apportioned between the three purposes; and apparently the part apportioned to the monument was rightly expended.

Lloyd v. *Lloyd* (2 Sim. N. S. 255) (March, 1852, V.-C. Kindersley). The judge said: "I am satisfied that a direction simply for keeping a tomb in repair is not a charitable use, and

is not in itself illegal. It may be illegal to vest property in trustees in perpetuity for such a purpose. But the direction that the widow and L. shall, out of their life interests, keep the tomb in repair, is quite lawful, and they are under an obligation, out of their annuities, to do so according to the directions of the will."

But surely neither the Attorney-General, nor any one else, could enforce the fulfilment of this so-called obligation, as the same judge seems to have perceived in the next case.

Trimmer v. *Danby* (25 L. J. Ch. 424) (March, 1856, V.-C. Kindersley). Testator gave his executors £1000, and directed them to lay it out in erecting a monument to him in St. Paul's Cathedral:—*Held*, valid as an authority to the executors. The judge said: "I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument, but if the residuary legatees or trustees insist upon the trust being executed, my opinion is that this Court is bound to see it carried out. I think, therefore, that as the trustees insist upon the sum of £1000 being laid out according to the directions in the will, that sum must be set apart for the purpose."

Rickard v. *Robson* (31 Beav. 244) (June 13, 1863, Romilly, M.R.). A number of trusts to keep in repair the tombs of the testator and a dozen of his relations, held all void as perpetuities for private benefit. Certain sums were directed to be invested for these purposes, and they all fell into the residue.

Fowler v. *Fowler* (33 Beav. 616) (June, 1864, Romilly, M.R.). Bequest of £500 to invest upon the permanent trust of maintaining in good order the graves, gravestones, and iron railings of the graves of seven persons in B. churchyard, and to pay the surplus of the yearly income to the rector of B. for the time being:

Held, that the trust to keep the graves in repair was void, and the amount required for that purpose not being ascertainable, the trust of the residue fell with it. The whole £500, therefore, fell into the general residue of the estate.

It is difficult to reconcile the latter part of this decision with the later cases, and particularly with *Dawson* v. *Small* (L. R. 18 Eq. 114).

Hoare v. *Osborne* (L. R. 1 Eq. 585) (Feb. 1866, V.-C. Kindersley). Will: "I desire that an ornamental painted window may be placed in H. church, the design and cost thereof to be at the discretion of my trustees. I also direct them to invest £600 in consols upon trust to authorize the minister and churchwardens of H. to receive the dividends and apply them in keeping in repair the monument of my mother in H. church, the vault in which she is interred, and the said window; and if any surplus shall at any time remain, to apply the same towards keeping in repair and ornamenting the chancel of the said church." The window had been erected with the sanction of the Court. The vault was in the churchyard.

The Vice-Chancellor considered it settled that a gift for the repair of a grave or tomb, whether in a church or not, was void, but it will be seen that the authorities only cover the case of a grave or tomb in a churchyard.

He also held that the trust to keep the window in repair was a good charity, as the window was part of the fabric of the church; and that the trust to keep in repair the monument in the church was also a good charity, as the monument was one of the ornaments of the church. He added that a trust to keep in perpetual repair the organ or bells of a church would be a good charity.

Monument in church.

The gift for the repair of the vault in the churchyard was, of course, void.

As to the disposal of the fund, he held that it was impossible to ascertain how much was required for the void object, and that the fund must be considered as divisible equally between the three objects. The third part attributable to the void object then fell into the residue of the estate. The minister and churchwardens would take the income of the other two-thirds, and perform the trusts of it, applying any surplus dividends to

repairing and ornamenting the chancel, which was clearly a good charitable trust.

It will be seen that the Vice-Chancellor in this case drew a distinction between a monument in a church and a tomb in a church. It would be more convenient that the line should be drawn between tombs in churches and tombs outside.

The case of *Hoare* v. *Osborne* will be found to be overruled by more recent cases on the point of the part attributable to the void object falling into the general residue of the estate. In the later cases it has been held to fall into the particular residue of fund directed to be invested.

Re Rigley's Trusts (15 W. R. 190) (Nov. 1866, V.-C. Kindersley). Will: direction to invest £800 and apply the dividends in paying the expense of a journey to be taken once a year for ever by trustees, or one of them, or the survivor, or his executors, administrators or assigns, or some other proper person appointed by them in writing, to the church of E., and in cleaning, glazing with stained and figured glass, and painting and keeping in repair the testator's family vault in the churchyard of E., and the tombstone over the same, and the iron fence surrounding it, and the yew tree growing near the same, and also the monumental tablet erected by the testator to the memory of his family in the church of E., and the fabric between and under which the same stood, and the railing in front thereof; and the testator directed the residue of the income to be paid over to the minister and churchwardens of E., to be laid out by them for the benefit of the poor of the parish. The tablet erected by the testator to the memory of his family was in a recess containing a window, under an arch opening into the church with an iron railing across it.

Tablet and railing in church.

The testator died in 1857, and the trustees invested the money and for some years performed the duties; but a claim being made by the residuary legatees, the fund was paid into Court:

Held, that the trust was void as to the matters outside of the church, but good as to those inside; and there must be an inquiry how much would be required for each set of objects,

reserving the question whether the number of objects was two, three, or more.

Fisk v. *A.-G.* (L. R. 4 Eq. 521) (July, 1867, V.-C. Wood).

Bequest of £1000 consols to the rector and churchwardens of J., upon trust to receive the dividends "and apply such part thereof as shall from time to time be necessary or required in keeping in repair my family grave, and the brick- and stone-work over the same, situate on the north side of the churchyard of the same church, and inscribed with the names of T. and A., and to pay or divide the residue of the said dividends and annual proceeds at Christmas in every year for ever to or amongst the aged poor of the parish or district of J. who shall be in the habit of attending the church of J."

Family grave.

A codicil directed that £5 out of the dividends should be paid annually to the incumbent for a sermon or lecture on the occasion of the division:

Sermon.

Held, that the trust for the repair of the grave was void, and that on the construction of the will the portion of the income directed to be so applied fell into the particular residue, and that the rector and churchwardens took the whole legacy discharged from the obligation of keeping the grave in repair.

Particular residue.

Hunter v. *Bullock* (L. R. 14 Eq. 45) (March, 1872, V.-C. Bacon). Will: gift of property on trust for A. for life, and after her death the ultimate residue to B., C., and D., subject to certain legacies and directions, including a direction to place inscriptions on the gravestone of himself and one of his relatives at K. or elsewhere as part of his funeral expenses, and a legacy in the following words: "I further will and desire that my executors do pay to the trustees of the Tailors' Institution at H. a further sum of £1000 3 per cent. stock, duty free, for the following use, that is, to pay the required amount for painting and keeping in repair the gravestone or gravestones at K. or elsewhere for the 15th of June yearly, if required, and to divide the balance that may remain into two equal parts," with directions for dividing the same amongst the pensioners of the institution.

Pensioners.

Apparently the gravestones had been erected and the inscriptions placed upon them. And evidence was given of a tender by a workman to keep the gravestones in repair for £2 a year.

The Vice-Chancellor said that he could not attend to this so-called evidence. He held, however, the whole gift of the £1000 good, and described the trust for keeping the gravestones in repair as an honorary trust. Apparently "honorary trust" means a trust which the trustee was not bound to perform, and the result was that the whole £1000 was held upon trust for the pensioners according to the will. The Vice-Chancellor seems to have laid stress on the words "if required" to aid him to come to this conclusion.

Dawson v. *Small* (L. R. 18 Eq. 114) (March, 1874, V.-C. Bacon). Bequest of £600 to be invested and the dividends to be applied "to keep up in good repair all the tombstones and headstones of my relations and self in the churchyard of G., with the wall and iron palisading surrounding the same, likewise the two headstones belonging to my family outside of the said inclosure, and if any of the ironwork or stonework want repairing that it always be done when wanted, and that all the headstones and tombstones always be kept clean and well painted, and that the letters be re-cut when growing illegible, and that all weeds and grass be kept from growing in the inside of the said inclosure, and that it be cleaned and scoured twice every year, and that likewise the headstones of my brother J., in S. churchyard, and of my cousin R. W., in the same churchyard, and of my cousin T. W., in the inclosure of G. churchyard, be kept in order and painted the same as is directed respecting the others before named. And I hereby direct and desire that any surplus money that may remain after defraying yearly the expenses as before stated shall be given every year, on the 6th day of September, my birthday . . . . to poor pious members of the Methodist Society resident in this town, above the age of fifty years." A codicil directed the distribution to be made by the executrix at her dwelling-house.

The Vice-Chancellor held that the circumstance that there

were no special trustees of the £600 was immaterial. He also held that the trust as to the tombstones was merely honorary, that nothing was required for them, that it was optional with the executors to lay out any money upon them, that the trust of the surplus was binding, and that the gift of £600 was a good charitable legacy, evidently for the purposes of the surplus declared by the will and codicil.

In re Williams (5 Ch. D. 735) (June, 1877, V.-C. Malins). Testator bequeathed to his executors two sums of £100 each to be by them invested and held on trust to apply the income in keeping in repair certain tombs. And the testator directed that if in any year the whole or any part of the income of such respective sums should not be required for such respective purposes for which it was given, the surplus should be invested, and, if necessary, applied in any future year in which the income might be insufficient for such purposes. But he directed that when and so soon as the value of such accumulation should amount to £25 and upwards, his trustees should pay over in equal shares to the incumbents for the time being of the parishes of C. and S. such sum of money as would reduce the value of such accumulations to the sum of £20, and that such incumbents should divide the money so paid over to them between and amongst three poor sick or infirm people residing in their respective parishes in equal shares:

Held, that the trust for repair of the tombs was void, and that the income so released fell into the particular residue, so that the whole income of the two sums of £100 was applicable for the purposes to which the surplus was devoted.

In re Birkett (9 Ch. D. 576) (July, 1878, Jessel, M.R.). Bequest "to the incumbent for the time being of U. the sum of £500, the income to be applied, when necessary, in keeping in good repair the grave and the railing and tombstone of my late father, and the remainder of such income to be applied by such incumbent for the time being in providing wine and bread for the sick poor of U.":—*Held*, that the trust for repair of the tomb was void, and following, but not approving, the four last-

mentioned cases, that the whole income was applicable for the purposes to which the surplus was devoted. The judgment in this case forms a very good comment upon the decisions on the destination of the income devoted to a void purpose.

In this case the executors paid the legacy into Court. The judge disapproved of this act, and left the executors to take their costs out of the residue of the testator's estate.

In re Sinclair's Trusts (L. R. Ir. xiii. 150) (Feb. 1884). A perpetual trust to keep in repair a family vault, treated as void, and the income released thereby treated as falling into the particular residue. Family vault.

Vaughan v. *Thomas* (33 Ch. D. 187) (June, 1886, North, J.). Bequest: "I bequeath the sum of £500 unto my trustees upon trust to invest the same on Government security, and to apply such part of the income thereof as may be necessary in or towards the expense of repairing and keeping in repair the family vault, tomb, and rails that I have erected in the parish churchyard of L., and the residue of such income in or towards the expense of repairing or keeping in repair the tomb erected to the memory of my late brother T., and the repairing and keeping in repair the same parish churchyard":—*Held*, that the first trust for repair of the family vault, tomb, and rails, was void, and that the income devoted to it fell into the residue of the income of this particular fund; that as to such residue, the trust for repair of the tomb of the brother was void, but the trust for repair of the churchyard was a good charity. That the amount required annually for repair of the tomb should be verified by affidavit, and so much of the £500 as was required to produce it should fall into the residue of the testator's estate; that the rest of the £500 should be invested and the dividends be applied in keeping the churchyard in repair. Ditto. Repair of churchyard.

Before concluding this chapter we ought to add a few words on the devolution of the property of which the trusts fail. It will be seen that the later of the above-mentioned cases are inconsistent with earlier ones. The earlier cases proceed upon the principles (1) that if an unascertainable portion of a fund Destination of property of which trusts fail.

is given upon a void trust and the residue upon a valid trust, the whole fails, and (2) that if an ascertainable portion is given on a void trust and the residue upon a good trust, the ascertainable portion falls into the general residue of the estate, and not into the particular residue of the fund in question. The later cases rebut the last-mentioned rule, and give the particular residue the benefit of the failure of the trusts of the first portion of the fund. It will also be seen that they go a good way towards abolishing the former rule, but a discussion of this question would be premature at the present point, so we must reserve it for a future chapter.

For the present we may remark that the decisions in *Fowler* v. *Fowler* (33 Beav. 616) (1864) and *Hoare* v. *Osborne* (L. R. 1 Eq. 585) (1866) appear to be overruled by the subsequent cases.

We may also refer to *West* v. *Shuttleworth* (1835) (2 M. & K. 684) stated in the chapter on Superstition, and suggest that the decision in that case is overruled in so far as it gave the benefit of the void gifts to the next of kin, and that the modern decisions would give the benefit to the trust declared of the remainder of the fund.

CHAPTER VIII.

On Gifts to Churches and Parishes.

We have already seen, in the chapter on Tombs, that trusts for keeping in repair monuments in churches have been held good, on the ground that the monuments were part of the ornamentation of the church, and that all trusts for the preservation of the ornamentation of churches were good charitable trusts. Ornaments of churches.

The statute of Elizabeth includes the repair of churches in the fourth item in its list of charities; and the word "church" has been held to include all ornaments of the church which are conducive to the proper observance of public worship according to the rules of the church.

The cases on this point are as follows:—

Hart v. *Brewer* (Cro. Eliz. 449) (T. T. 36 or 37 Eliz. 1594 or 5). Land had been devised to expend 3*s.* 4*d.* annually upon an obit, and apply the surplus to the repairs and ornaments of a church:—*Held*, that the Crown was only entitled to the 3*s.* 4*d.* per annum. The rest was held to be a good charity, and not a superstitious use within the statute 1 Edw. 6, c. 14.

A.-G. v. *Oakaver* (cit. 1 Ves. Sen. 536) (Feb. 1736, M.R., affirmed by L.C. Hardwicke). The Master of the Rolls established a stipend given to keep up an organ and for the organist; but as to £40 per annum to the choristers he refused it. On appeal, the Lord Chancellor affirmed the decree, and said that it was contrary to the constitution of the Church of England to have choristers in parochial churches, and that they would be under no rule of government as they were in other churches; and the law would not allow that they should be under the government of the heir-at-law, *i.e.* of the donor. Organ. Organist. Choristers.

It may be doubted, however, whether a bequest for choristers in a parish church would now be held to be void as being illegal. In *Turner* v. *Ogden* (1787) a very similar gift was considered to be charitable ; and in *Watson* v. *Blakeney* (Apr. 1887), noticed below, Mr. Justice North seems to have considered a choir fund to be a charitable object. (See also *Re Palatine Estate Charity* (S. J. 1888, 458), noticed below.)

Choir fund.

Turner v. *Ogden* (1 Cox, 316) (Feb. 6, 1787, M.R.). A. by will gave 20*s.* per annum to the curate of the parish of O. for preaching a sermon on Ascension Day, also £5 per annum to the clerk of the parish to keep the chimes in repair, to play the 4th and 92nd Psalms; also £3 per annum to be paid on Ascension Day to the singers who sat in the gallery of the church ; and he directed all these payments to be made out of a leasehold house, so long as the lease lasted, and the house to be kept in repair:—*Held*, all charities, and therefore void under the Georgian Mortmain Act. The Master of the Rolls considered that singing psalms was part of the religious service, and a charitable object on that account.

Sermon.

Chimes.

Singers.

Adnam v. *Cole* (6 Beav. 353) (June 26, 1843, Lord Langdale). A residue given for erecting a monument to the testator and building an organ gallery in a certain church, and putting up an organ in the gallery :—*Held*, that the last two objects were charitable, and the master was directed to apportion the residue amongst the objects.

Organ gallery and organ.

In re the Estate of the Church of Donington-on-Baine (6 Jur. N. S. 290) (March, 1860, V.-C. Stuart). In this case the rector and churchwardens were appointed trustees of a charity of which the object was the repair of the fabric of the church.

Repair of fabric.

In *Watson* v. *Blakeney* (35 W. R. 730) (Apr. 1887, North, J.). A testator gave his estate to his executor on trust to convert and to "pay the residue to the vicar and churchwardens for the time being of the Priory and Christ Church of B., to be applied by them towards the choir fund or a new clock for the tower, according to the discretion of my said trustee." The Priory and Christ Church were two churches with different vicars and

Clock.

churchwardens. The former required a new clock, and the trustee of the will wished to devote £200 to that purpose.

This was held to be proper, and it was held that a new clock was an object within the Act 43 Geo. 3, c. 108, so that impure personalty might be applied for it up to the limit of £500. The gift of the pure personalty was also held good, and the gift of the rest of the impure personalty bad as to the choir fund, on the ground that that was a charitable object. Choir fund.

In *Re Palatine Estate Charity* (S. J. (1888) 458, W. N. (1888) 111), a trust was found "for and towards the reparations, ornaments, and other necessary occasions of the parish church of N."

Stirling, J., held that the erection of a spire, which was part of the architect's original design for the church, was a proper object of this trust. But he spoke of the spire containing the bells, which shews that he considered a bell-chamber as part of the proposed spire, and probably used the word "spire" to include the upper part of the tower also. He held the spire to come under the words "necessary occasions," but evidently inclined to the opinion that it might be included under ornaments or reparations. He also allowed the salaries of the sexton and organ-tuner out of the fund, but not those of the organist and singers, saying that the only salaries payable out of the fund were those in respect of the fabric of the church and the care thereof. Spire. Bell-chamber. Sexton. Tuner. Organist. Singers.

Duke, in his work on Charitable Uses, p. 109 (Duke, B. 354), says: "So for the building of a sessions house for a city or county, the making of a new or repair of an old pulpit in a church; or the buying of a pulpit cushion, or pulpit cloth; or the setting up of new bells where none are, or amending of them where they are out of order. These and such like provisions, gifts, and limitations, seem to be reckoned as charitable works by the judgment of the law. See for this, Popham Rep. 139." Pulpit and cushion. Bells.

But the case referred to in Popham, 139, is *Sir Baptist Hickes's Case* in the Star Chamber (c. 1618 apparently) as follows:—Sir B. Hickes had founded an almshouse at Camden, in Gloucestershire, and had made in the same town a new bell tuneable to others, and a new pulpit, and had adorned it with a cushion and

cloth, and had bestowed cost on the sessions house in Middlesex. And a neighbour had written a letter to Sir B. Hickes, saying that the latter had done these charitable works for vain-glory and ostentation and to have popular applause. The Court fined the neighbour £500, saying that the recipient of such a letter was forced to ask the advice of friends upon it and so to publish it.

The matters mentioned by Duke may, however, be regarded as good charitable objects on the general principle that they are proper accessories to the decent and orderly conduct of divine service.

Parish churchyard.

In *Vaughan* v. *Thomas* (33 Ch. D. 187) (June, 1886) Mr. Justice North held that a trust to keep a parish churchyard in repair was a good charity. He based this decision on the Act 43 Geo. 3, c. 108, passed in 1803, which he regarded as a legislative expression that the objects specified in it were all for the public benefit, and therefore good charities. These objects are as follows:—"The erecting, rebuilding, repairing, purchasing, or providing any church or chapel, where liturgy and rites of the said United Church are or shall be used or observed, or any mansion-house for the residence of any minister of the said United Church, officiating or to officiate in any such church or chapel, or of any outbuildings, offices, churchyard, or glebe for the same respectively." He also considered that the repair of a parish churchyard was a public benefit, because it was the duty of the parishioners to keep it in repair. It is clear that these reasons do not apply to burial-grounds attached to Nonconformist chapels. Nevertheless, the feeling in favour of religious equality is so great, that the Court would doubtless endeavour to find some ground for placing bequests for their repair on the same footing as parish churchyards.

Nonconformist burial ground.

Repair of parsonage.

In *A.-G.* v. *Bishop of Chester* (1 Bro. C. C. 444) (1785) a bequest for the repair of parsonage houses, prior to the Act 43 Geo. 3, c. 108, was held a good charity. And a bequest for building a new parsonage-house on glebe land had previously been held good in *Brodie* v. *Duke of Chandos* in 1773 (1 Bro. C. C. 444, n.).

Sir Francis Moore, in his disquisition on the statute of Elizabeth, also says (Duke, B. 124) :—" A use may be construed to be within the statute by equity taken upon the letter of the statute, and so within the words, *repair of churches*, chapels may be taken by equity, and under that word *church* all ornaments and concurrents convenient for the decent and orderly administration of divine service (as for the finding of a pulpit or sermon-bell) may be comprehended : for reparations of churches are but preparations for the administration of divine service."

Repair of chapels.

The chapels here mentioned appear to mean only chapels used for service according to the established religion, as no others existed at the time. But as other forms of religion have been legalised, their chapels have been placed in the same position as chapels of the established religion, so far as regards the principle that trusts for their repair are good charitable trusts.

Nonconformist chapels.

Gifts to a church, *eo nomine*, are treated as gifts for the repair or improvement of the church, and are good charitable gifts accordingly, and payable to the churchwardens, as is shewn by the following cases :—

Gifts to church.

Wingfield's Case (1628) (Duke, 80, B. 374). Money was given for the good of the church of Dulk, and this was resolved to be a good gift, notwithstanding these general words.

A.-G. v. *Ruper* (2 P. Wms. 125) (H. T. 1722, M.R.). Gifts by will of £500 to the parish church of St. Helen's, London :

Held, a good charity, and that the money should be paid to the churchwardens for the repairs of the church and improving and adorning it.

Cresswell v. *Cresswell* (L. R. 6 Eq. 69) (April 17, 1868, V.-C. Giffard). Testatrix gave by codicil " £200 to Brompton church to be disposed of as Dr. I. wishes." Dr. I.'s wife was one of the attesting witnesses to the codicil :

Held, that the legacy was valid, and that Dr. I. was a trustee for the purpose of directing the disposition of the legacy ; and that it might be disposed of as he might direct in the repair, improvement, enlargement, or ornamentation of Brompton church, but not for Dr. I.'s personal benefit.

Apparently Dr. I. was the incumbent of Brompton, but it is not distinctly stated so in the report.

Perpetual trust for church.

A perpetual gift for the use of a church is therefore good, and any surplus arising under such a gift after doing all repairs will be applicable *cy-près* for the benefit of the same parish. This is shewn by—

A.-G. v. *Vivian* (1 Russ. 226) (Aug. 9, 1826, Gifford, M.R.). J. Burton, in 1503, by a document made between himself and others, but also purporting to be his will, assured certain hereditaments in the city of London to the parson and churchwardens of St. Austen's, willing them out of the rents to maintain a taper to burn during service in the church, and added, "I will that the residue of the issues, profits, and revenues coming of all the said lands and tenements go to the supportation and maintaining of the reparations of the said lands and tenements, and to the use of the said parish church at the discretion of the said parson and churchwardens, and of their successors, parson and churchwardens of the same parish church of St. Austen for the time being for evermore."

Churches united.

The church and that of the adjacent parish of St. Faith's were burnt in the fire of London, and the Act 22 Car. 2, c. 11, s. 63, provided for the rebuilding of St. Austen's church and made it the parish church of both parishes, but preserved by s. 68 the parochial rights of both parishes. St. Faith's was a bigger parish than St. Austen's, and an arrangement was forthwith made that two-thirds of the cost of repairing the church should be borne by the parish of St. Faith's. The remaining third was contributed by St. Austen's parish out of a fund formed by the parish rates, the rents of the tenements devised by Burton and other parish property. Apparently the rents of the tenements devised by Burton were more than sufficient to defray one-third of the repairs of the church; and some parishioners of St. Faith's filed an information and bill, claiming to have the whole of the rents applied for the repairs, and an adjustment of past accounts on that principle.

It was held that the parishioners of St. Faith's had no interest

in the matter and could not support a bill: the costs of repairing the church were apportionable under the Act of Car. 2, and the division into two-thirds and one-third was proper under the circumstances: and the rents of the property were applicable in ease of the burden falling on the parish of St. Austen's. As to the surplus which had been applied in aid of the parish rates, the judge thought that that might eventually be considered a proper application, but he could not hold it so then. He thought it a case to refer to the Master to settle a scheme for the administration of the surplus fund; but first he directed the information to stand over, that the Solicitor-General might be brought before the Court to maintain the rights of the Crown in respect of the superstitious use impressed upon the property.

We have seen above that money given to a church is payable to the churchwardens and applicable for charitable purposes in their hands. In like manner a legacy to a parish, *eo nomine*, is presumed to be given for charitable purposes, such as the poor of the parish, and is a charitable legacy accordingly: *West* v. *Knight* (1 Ca. in Ch. 134) (1669). Conversely, property found in the hands of churchwardens is presumed to be fixed with some charitable trust or other, and is subject to the law of charitable property. Of course in deciding the nature of the trust attached to it, the Court would receive as evidence the mode in which the money produced by it had, as a matter of fact, been applied.

Gifts to parish.

Parish property always charitable.

The following cases illustrate these points:—

West v. *Knight* (1 Ca. in Ch. 134) (Oct. 27) (21 Car. 2, 1669, M.R.). Testator bequeathed £50 to the parish of C., where he was born, without saying to what use:

Held, a good legacy, and the Master to see the money disposed for the benefit of the poor of the parish.

The parson, churchwardens, and overseers were the plaintiffs in this case.

A.-G. v. *Lord Hotham* (T. & R. 209) (June 12, 1823, Plumer, M.R.). The churchwardens of a parish, with the consent of the vestry, from time to time granted leases of certain land,

and applied the rents towards repairs of the church, maintenance of the poor, and other parochial purposes. In 1789 a lease of the land was granted for ninety-nine years at a fixed rent. The lease was not a building lease, but a mere agricultural lease:

Held, that the lease was void, as being improvident. The lands were considered as affected with a charitable trust.

Site of workhouse.

A.-G. v. *Corporation of Berwick-upon-Tweed* (Tam. 239) (Dec. 1829, Leach, M.R.). In 1653 land was bought out of money given by individuals, and conveyed to the churchwardens and overseers for erecting and maintaining a workhouse:

Held, that as this was a relief of the poor-rates, the rent of the land should be applied in aid of the poor-rates.

Doe v. *Howells and Others* (2 B. & Ad. 744) (June, 1831, Lord Tenterden). A grant of land to trustees in trust for the churchwardens and overseers of the poor and inhabitants of the parish of O. for the time being, to the intent that the rents and profits might be paid and applied for their use and benefit from time to time in aid of the rate for the relief of the poor:

Aid of poor rate.

Held, a charitable trust.

Re Hall's Charity (14 Beav. 115) (May, 1851, Romilly, M.R.). By an old Latin deed of 4th March, 1576, land was limited to feoffees in effect to the use of the reparation of the parish church of U., and to the use and reparation of a bridge called U. bridge, and to the use of other things needful within the parish of U., from time to time to be done at the discretion of the aforesaid co-feoffees and their heirs, and of other the parishioners of U. aforesaid, to be applied and distributed for ever.

Things needful in parish.

Upon petition under Sir S. Romilly's Act, the Court declared that one-third of the income was applicable to repairs of the church, one-third to repairs of the bridge, and one-third for other things necessary within the parish, at the discretion of the trustees and parishioners.

Church.

Bridge.

A.-G. v. *Blizard* (21 Beav. 233) (Dec., 1855, Romilly, M.R.). Land at Richmond had been granted on trust for building a workhouse on part, using other part as a burial ground, and as

to other parts "in trust for the employment and support of the poor of the said parish." Poor of parish.

The income of the latter portion was applied in aid of the police, poor, and other rates, and for defraying the expenses of registration of voters and the ordinary charges and expenses of the parish. It was held under all the circumstances of the grant that it was a gift in trust for the benefit of the parish of Richmond, and that the income was properly applied.

A.-G. v. *Webster* (L. R. 20 Eq. 483) (June, 1875, Jessel, M.R.). Land was purchased in 1585 out of parish money, and conveyed to trustees, and a contemporaneous memorandum stated that it was to be held to the use of the parish:

Held, that a trust for a parish would be void if not charitable, and the trust was therefore a charitable one, and the income of the property must be applied for charitable purposes.

In *A.-G.* v. *Webster* the defendants stated that after 1585 the disbursements in the churchwardens' accounts were for general parochial purposes, including the salary of the sexton, the salary of one R. B. for cleaning the channel of the street and Horse Alley, for ringing and repairing the bells, for repairs to the parish properties, for gravel for the causeway without Moorgate, and paving the street in front of the church, for mending the pews, for emptying cesspools, and for expenditure in connection with draining and repairing the church, for communion bread and wine, and for books of prayer, and expenditure connected with the archdeacon's visitation. There were also disbursements for removing stable dung, for cleaning the channel in the street, for candles, for ringing at six o'clock in the morning and eight o'clock at night, for ringers on the day of Her Majesty's coronation, for amending and new hanging the great bell, for the carriage of ordure out of the common privy or vault, for paving twenty yards of Chymney Alley, for laying loads of gravel on the causeway without Moorgate, and for leather for fire-buckets for the church. In 1589 there was a payment for two dozen of new leather buckets bought for the use of the church by virtue of a precept from the Lord Mayor, and for ladders for the use of Parochial purposes.

the parish also by command of the Lord Mayor, and for paving the street.

It appears from the judgment that the Master of the Rolls read this statement, and said: "That is, the rents have been used ever since the year 1585 for charitable purposes; that is, for charitable purposes consistently with the definition which the word 'charitable' receives in this Court."

In re St. Bride's, Fleet Street, Church or Parish Estate (W. N. 1877, p. 95) (April 16, M.R., afterwards on app., ibid. 149, June 9) (35 Ch. D. 147, n.). The churchwardens had long been in possession or receipt of the rents of certain houses within the parish, of which leases were granted by the vicar and churchwardens, and the money was applied for parish purposes. The title deeds, under which the property was derived, had been lost long ago.

The Charity Commissioners called on the churchwardens to render accounts of this property under s. 14 of the Charitable Trusts Act, 1853, and s. 9 of the like Act, 1855:

Held, that the property was affected with a charitable trust, and the churchwardens were bound to account accordingly.

Site of workhouse.

In re St. Botolph without Bishopsgate Parish Estates (35 Ch. D. 142) (March 1887, North, J.). The parish, in 1794, had purchased the site of a workhouse, and built such a house; but in 1837 the parish was amalgamated with others in one union, and the workhouse was no longer required. It had since been let, and the rent had been applied in aid of the poor rates. The Charity Commissioners contended that this was charity property, and subject to the Act 46 & 47 Vict. c. 36. The parochial authorities petitioned against the contention under s. 10 of that Act:

Held, that this was charitable property, inasmuch as it was applicable for a charitable purpose; the proper mode of application, not the source from which property is derived, being the test of charity or no charity.

Consistently with these decisions, a conveyance of land to parish officers expressed to be for the purpose of the erection of

a workhouse is a conveyance for a charitable use: *Webster* v. *Southey* (36 Ch. D. 9) (May 1877, Kay, J.) overruling *Burnaby* v. *Barsby* (4 H. & N. 690) (June, 1859).

The guardians of the poor of Plymouth were also regarded as a charity in *Luckraft* v. *Pridham* (6 Ch. D. 205) (July, 1877, C.A.).

As parish funds are charitable, an information would lie to procure the restoration of a sum of money improperly paid out of them: *A.-G.* v. *Compton* (1 Y. & C. Ch. 417) (March, 1842, V.-C. Knight-Bruce). Compare *A.-G.* v. *Mayor of Wigan* (Kay 268) (Jan. 1854, V.-C. Wood), and *A.-G.* v. *Mayor of Liverpool* (1 My. & Cr. 171) (Dec. 1835, M.R.).

CHAPTER IX.

Of Religious Trusts.

A.—*History of the Law.*

Intolerance prior to 1688.

At the time of the Revolution of 1688 the laws relating to religion may be summed up, by saying that there was a common law principle that Christianity was part of the law of the land, and there were a number of statutes which may fitly be called Acts of Intolerance, enforcing conformity with the established church, and imposing heavy penalties on the exercise of any other form of religion.

The only one of these penalties which is still in force is that imposed by the 10th section of the Act of Uniformity (13 & 14 Car. 2, c. 4), which is in the following words :—

An existing penalty.

"And be it further enacted by the authority aforesaid that no person whatsoever shall thenceforth be capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, nor shall presume to consecrate and administer the holy sacrament of the Lord's Supper, before such time as he shall be ordained priest according to the form and manner in and by the said book prescribed, unless he have formerly been made priest by episcopal ordination, upon pain to forfeit for every offence the sum of £100, one moiety thereof to the King's Majesty, the other moiety thereof to be equally divided between the poor of the parish where the offence shall be committed, and such person or persons as shall sue for the same by action of debt, bill, plaint, or information in any of His Majesty's Courts of Record, wherein no essoine protection or wager of law shall be allowed, and to be disabled from taking or being ad-

mitted into the order of priest by the space of one whole year then next following."

Then came the Toleration Act of 1688 (1 Will. and Mar. c. 18), which expressly refused any relief to Unitarians or Roman Catholics, but relieved other Nonconformists from the penalties inflicted by the Acts of Intolerance, provided they complied with certain terms as to registering their places of worship, and took certain oaths of supremacy and allegiance and made a certain declaration against transubstantiation, which have since been abolished. For ministers it was also required that they should sign the Thirty-nine Articles of the Church of England, except those relating to church discipline and infant baptism. Toleration Act, 1688.

A few years afterwards, namely, in 1697, an Act was passed (9 & 10 Will. 3, c. 32) which is commonly called the Blasphemy Act, which is still in force, except so far as relates to denying concerning the Trinity, and of which the words are as follows:— Blasphemy Act, 1697.

"Whereas many persons have of late years avowed and published many blasphemous and impious opinions contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of the kingdom, wherefore, for the more effectual suppressing of the said detestable crimes: Be it enacted, that if any person or persons having been educated in, or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking [deny any one of the persons of the Holy Trinity to be God, or] shall assert or maintain there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and shall upon indictment or information in any of His Majesty's Courts at Westminster, or at the Assizes, be thereof lawfully convicted by the oath of two or more credible witnesses; such person or persons for the first offence shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in

them, or any profit or advantage appertaining to them or any of them; and if any person or persons so convicted as aforesaid, shall, at the time of his or their conviction, enjoy or possess any office, place, or employment, such office, place, or employment shall be void, and is hereby declared void: and if such person or persons shall be a second time lawfully convicted as aforesaid, of all or any of the aforesaid crime or crimes, that then he or they shall from thenceforth be disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical for ever within this realm, and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such conviction.

"2. Provided always, that no person shall be prosecuted by virtue of this Act for any words spoken, unless the information of such words shall be given upon oath before one or more justice or justices of the peace, within four days after such words spoken, and the prosecution of such offence be within three months after such information.

"3. That any person or persons convicted of all or any of the aforesaid crime or crimes, in manner aforesaid, shall, for the first offence (upon his, her, or their acknowledgment or renunciation of such offence or erroneous opinions in the same court where such person or persons was or were convicted as aforesaid, within the space of four months after his, her, or their conviction), be discharged from all penalties and disabilities incurred by such conviction, anything in this Act contained to the contrary thereof in anywise notwithstanding."

NOTE.—The provision in this Act that a person convicted may be free from penalties on acknowledging his offence, almost seems like a joke; but perhaps there was some clever liberal-minded person in office at the time, who purposely slipped this word in to offer a loophole whereby anybody might escape out of the Act.

Afterwards, in 1779, an Act was passed (19 Geo. 3, c. 44), which may be called the Protestant Test Act, leaving ministers still liable to take the oaths of allegiance and supremacy, and to make the declaration against transubstantiation, but enacting that any minister who scrupled to sign the articles as above-mentioned, might, instead of signing them, make the following declaration:— Protestant Test Act, 1779.

"I, A.B., do solemnly declare, in the presence of Almighty God, that I am a Christian and a Protestant, and as such that I believe that the Scriptures of the Old and New Testaments, as commonly received among Protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice."

This provision is still in force, so far as it is applicable to the present state of the law.

Then, in 1812, an Act was passed (52 Geo. 3, c. 155), which may be called the Toleration Amendment Act, 1812, repealing some of the old Acts of Intolerance, and substituting in their place an enactment (s. 2) which is still in force, with certain modifications hereinafter mentioned, and is in the words following, that is to say:— Toleration Amendment Act, 1812.

"And be it further enacted that from and after the passing of this Act no congregation or assembly for religious worship of Protestants (at which there shall be present more than twenty persons besides the immediate family and servants of the person in whose house or upon whose premises such meeting, congregation, or assembly shall be had) shall be permitted or allowed unless and until the place of such meeting, if the same shall not have been duly certified and registered under any former Act or Acts of Parliament relating to registering places of religious worship, shall have been, or shall be, certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the general or quarter sessions of the peace for the county, riding, division, city, town, or place in which such meeting shall be held."

And after directing certain returns to be made and certificates granted, it continues :—

"And every person who shall knowingly permit or suffer any such congregation or assembly as aforesaid to meet in any place occupied by him until the same shall have been so certified as aforesaid shall forfeit for every time any such congregation or assembly shall meet contrary to the provisions of this Act a sum not exceeding £20 nor less than twenty shillings at the discretion of the justices who shall convict for such offence."

The next section (s. 3) imposes a penalty not exceeding £30 nor less that forty shillings on any person who shall teach or preach in any such assembly without the consent of the occupier. Then s. 4 enacts that both ministers and members of congregations for the religious worship of Protestants whose places of meeting shall be certified under the Act shall be exempt from the penalties imposed by the Acts of Intolerance ; but s. 5 provides that any person who shall teach or preach at any place of religious worship certified under the Act shall, when required in writing by any justice of the peace, make and subscribe the oaths and declarations specified in the Protestant Test Act. These are the oaths of allegiance and supremacy, and the declaration against transubstantiation and the Protestant Test. Any minister refusing to take these oaths or to make these declarations is forbidden by the same section (s. 5) to teach or preach under a penalty of £10 for each offence.

These statutes, in as far as they require oaths and the declaration against transubstantiation, have been virtually repealed by several Acts and formally repealed by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48); but the provisions with respect to the Protestant Test are expressly left in force.

Unitarian Relief Act.

In 1813, the year following the Toleration Amendment Act, which has been noticed above, the Unitarian Relief Act was passed (53 Geo. 3, c. 160). This enacts that so much of the Toleration Act "as provides that that Act or anything therein contained should not extend or be construed to extend to give

any ease, benefit, or advantage to persons denying the Trinity as therein mentioned, be and the same is hereby repealed;" and further (s. 2) that the provisions of the Blasphemy Act, "so far as the same relate to persons denying as therein mentioned, respecting the Holy Trinity, be and the same are hereby repealed."

Roman Catholic Aid Act, 1832.

In 1832, the benefit of the Toleration Acts were extended to Roman Catholics by the Act 2 & 3 Will. 4, c. 115, which enacts that "His Majesty's subjects professing the Roman Catholic religion, in respect of their schools, places of religious worship, education, and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant dissenters are subject to in England in respect to their schools and places for religious worship, education, and charitable purposes, and not further or otherwise."

This Act is retrospective, so as to establish trusts created prior to its passing, but one clause in it provided that it should not affect any litigation then pending.

Jewish Relief Act.

In 1846 a Jewish Relief Act was passed (9 & 10 Vict. c. 59) enacting that "Her Majesty's subjects professing the Jewish religion, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise."

Religious Worship Acts.

The Religious Worship Act, 1852 (15 & 16 Vict. c. 36) required places of religious worship of Protestant dissenters to be certified to the Registrar-General of births, deaths and marriages; and finally the Religious Worship Act, 1855 (18 & 19 Vict. c. 81) enacts (s. 2) "that every place of religious worship of Protestant dissenters or other Protestants and of Roman Catholics and Jews not already certified, and every place of meeting for religious worship of any other body or denomination of persons, may be certified to the Registrar-General, through the superintendent registrar of the district in which the place is situate."

It also provides that the certifying of any place shall have the same effect as certification under the prior law.

Having now mentioned the principal statutes relating to the teaching of religion, we will place them in a tabular form :—

1662. Act of Uniformity.
1688. Toleration Act.
1697. Blasphemy Act.
1779. Protestant Test Act.
1812. Toleration Amendment Act.
1813. Unitarian Relief Act.
1832. Roman Catholic Aid Act.
1846. Jewish Relief Act.
1852. Religious Worship Act, 1852.
1855. Religious Worship Act, 1855.
1871. Promissory Oaths Act, 1871.

Is the Protestant Test enforceable?

These statutes appear on the face of them to subject the minister of any registered place of worship to the liability to be called on to take the Protestant Test, which has been mentioned above. It is probable that the legislature saw nothing incongruous in this result when it admitted Unitarians within the pale of the Toleration Acts in 1813 ; but in admitting Roman Catholics and Jews it can never have intended to impose the Protestant Test. Now, however, many Unitarians are further removed from that test than either Roman Catholics or Jews are. Moreover, all the Acts of Intolerance have now been abolished, so that the minister and members of a church which was neither Protestant, Roman Catholic, nor Jewish would incur no penalty if they abstained from registering. The only existing penalties are those imposed by the Toleration Amendment Act, 1812, on Protestants, and extended as above mentioned to Roman Catholics and Jews; and the penalty of £100 imposed by the Act of Uniformity on a minister consecrating and administering the Lord's Supper; which presumably means, according to the rites of the Church of England.

This brings us now face to face with the principal question involved in this part of our subject. Before the Toleration Act,

1688, all trusts for the promotion of religious opinions differing from the Established Church were void, being trusts for the promulgation of opinions on which penalties were imposed by law. After that date trusts for Protestant Dissenters ceased to be illegal, and became on the contrary good charitable trusts. In 1813 trusts for Unitarianism passed in the same way from illegal trusts to good charities; and in 1832 Roman Catholic trusts followed, and Jewish trusts in 1846. When we say that trusts for Unitarianism became good charities in 1812, we, perhaps, ought to have said such Unitarianism as was within the Protestant Test above mentioned. Whether the same may be said of that form of Unitarianism which rejects the authority of the Bible, and takes its stand on the principle that it is reasonable to have faith in the Power which has brought the universe into being, is the question to be considered.

Are all Unitarian trusts valid?

We have seen that the Blasphemy Act mentioned above imposes penalties on persons who maintain that there are more Gods than one, or deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority. But this Act only applies to persons who have been educated in, or at any time made profession of, the Christian religion. Besides this statute, however, there was said to be a very vague common law principle, that Christianity was part of the law of the land. We will proceed to consider the application of this principle as it is open to contention that it is still law.

Blasphemy Cases.

Blasphemy cases.

In E. T. 1617 one Atwood was sentenced by justices to pay 100 marks for saying "that the religion now professed was a new religion within fifty years; preaching was but prating, and hearing of service more edifying than two hours' preaching."

He appealed against the conviction, but it was affirmed (2 Ro. Abr. 78), though not without some doubt as to the jurisdiction of the justices (Cro. Jac. 421).

In 1675, before the Blasphemy Act, a man named Taylor was

accused of saying (1) that Jesus Christ was a bastard; (2) that he was a whore-master; (3) that religion was a cheat, and (4) that he neither feared God, the devil, or man. He denied the first charge; said that the second meant master of the whore of Babylon, and gave, the report says, such kind of evasions for the rest. Hale, J., said that to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law. The prisoner was sentenced to stand in the pillory in three different places, to pay 1000 marks fine, and to find sureties for his good behaviour during life (*Taylor's Case* (1 Vent. 205; 3 Keble, 607; Tremayne's Entries, 226)).

In E. T. 1711, in *R.* v. *Clendon*, there was a special verdict on a libel about the Trinity (2 Str. 789).

In H. T. 1720–1, in *R.* v. *Hall*, the defendant was convicted and sentenced for a publication called 'A Sober Reply to the Merry Arguments about the Trinity' (1 Str. 416; 2 Str. 789).

Arguments against the Trinity must be regarded as clearly legalized now by the Unitarian Relief Act, and these cases are no longer precedents.

In 1726 one Elwall was indicted for publishing a book against the doctrine of the Trinity, but he was acquitted (Odgers on Libel, 2nd ed. 443).

In 1729 one Woolston was indicted on the charge of having published "four blasphemous discourses on the miracles of our Saviour." The judge in passing sentence said that to write against Christianity in general was an offence punishable at common law; but that did not include disputes between learned men upon particular controverted points. He however condemned the prisoner to pay £25 fine for each discourse, to suffer a year's imprisonment and to enter into recognizances for good behaviour during life in £3000, and to find sureties for £2000 (*R.* v. *Woolston*, 2 Str. 834).

In 1756 an information was filed against one Jacob Ilive, for

publishing a libel tending to vilify and subvert the Christian religion, and to blaspheme Jesus Christ, to cause his divinity to be denied, to represent him as an impostor, to scandalize, ridicule, and bring into contempt his most holy life and doctrine, and to cause the truth of the Christian religion to be disbelieved and totally rejected, by representing the same as spurious and chimerical, and a piece of forgery and priestcraft (Starkie, 4th ed. 596, referring to Hil. Term, 29 Geo. 2; Dig. L. L. 83). The result of this information is not stated.

In 1763 an old man named Annet, seventy years old, and in great poverty, was sentenced for blasphemy, but for what words we are not told by the report (*R.* v. *Annet*, W. Blackst. Rep. 395; 3 Barn. Ecc. 386), to stand in the pillory, to suffer a month's imprisonment, a year's hard labour in the house of correction, to pay 6*s.* 8*d.* fine, and to give security for £100, and to find two sureties for £50 each for his good behaviour during life. It is stated in Starkie on Libel (4th ed. 596) that Annet published a paper called the *Free Inquirer*, tending to blaspheme Almighty God, and to ridicule, traduce, and discredit His Holy Scriptures, particularly the Pentateuch, and to represent and cause it to be believed that the prophet Moses was an impostor, and that the sacred truths and miracles recorded and set forth in the Pentateuch were impositions and false inventions, and thereby to diffuse and propagate irreligious and diabolical opinions in the minds of His Majesty's subjects, and to shake the foundations of the Christian religion, and of the civil and ecclesiastical government established in this kingdom.

In 1797 one Williams was indicted for publishing Paine's 'Age of Reason,' which, according to the view taken by the Court, denied the authority of the Old and New Testaments, asserted that reason was the only rule by which the conduct of man ought to be guided, and ridiculed the prophets, Jesus Christ, his disciples, and the Scriptures. Mr. Justice Ashurst said this was an offence against law and government from its direct tendency to dissolve all the bonds and obligations of civil society, and that upon this ground it was that the Christian

religion was part of the law of the land (Starkie on Libel, 4th ed. 597; Howell's State Trials, xxvi. 654).

In 1819 a Mr. Carlile was indicted for publishing the same book, and was fined £1500, sentenced to three years' imprisonment, and ordered to find sureties for his good behaviour during the rest of his life (*R.* v. *Carlile*, 3 B. & Ald. 161).

His wife then published a book called 'The Mock Trial of Mr. Carlile,' in which she set out the whole proceedings in full, including Mr. Carlile's defence, in the course of which he read to the jury the whole of Paine's 'Age of Reason.' Proceedings were taken against her, and it was held that the general liberty of publishing all judicial proceedings did not apply to her case (*R.* v. *Mary Carlile*, 3 B. & Ald. 167).

In 1812, also, one Eaton was convicted on a charge of representing Jesus Christ as an impostor, the Christian religion as a mere fable, and those who believed in it as infidels to God (Starkie, 4th ed. 597).

In 1821 occurred the case of *The King* v. *Davison* (4 B. & Ald. 329). There the defendant had been indicted for blasphemy. He conducted his own defence, and said, amongst other things: "The Deist is anathematised because he cannot believe that some traditions, handed down amongst the Jews and the Christians, are a divine revelation, and not only superior to the several and respective revelations possessed by the Turks, the Brahmins or the Hindoos, and many others, but the only genuine and authentic revelation in existence. Now it so happens that the Deist considers this collection of ancient tracts to contain sentiments, stories, and representations totally derogatory to the honour of a God, destructive to pure principles of morality, and opposed to the best interests of society." For these expressions Best, J., fined him £40, but remitted the fine on his making some apology. He applied for a new trial on the ground that he was paralysed in his defence by this and other fines imposed while he was making it, and that he thereby omitted to quote one hundred authorities. A new trial was refused him. Abbott, C.J., said: "It is absolutely a question

whether the law of the land shall, or shall not, continue to be properly administered; for it is utterly impossible that the law can be so administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence."

In 1822 one Waddington was convicted on a charge of stating that Jesus Christ was an impostor, a murderer in principle, and a fanatic (*R.* v. *Waddington*, 1 B. & C. 26).

R. v. *Hetherington* (5 Jur. 529) (Hilary, 1841, Lord Denman, Littledale, and Patteson, JJ.) Indictment for a blasphemous libel on the Old Testament. The defendant had been found guilty, the judge having told the jury that if they thought the publication tended to question or cast disgrace upon the Old Testament, it was a libel.

An application for a new trial or stay of judgment was refused. Lord Denman said: "The Old Testament is so connected with the New, that it is impossible that such a publication as this could be uttered without reflecting upon Christianity in general; and, therefore, I think an attack upon the Old Testament of the nature described in the indictment is clearly indictable."

Hetherington was sentenced to four months' imprisonment. The book for which he was prosecuted was Haslam's 'Letters to the Clergy.' He retaliated for the prosecution by purchasing copies of Shelley's works, and prosecuting the publisher of them, who was found guilty (*R.* v. *Moxon*, 1841) (2 Modern State Trials, 356). The passages on which this prosecution was based were all taken from Shelley's 'Queen Mab.' They ridiculed belief in a Deity and in divine rewards and punishments.

This case was followed by a number of prosecutions for alleged blasphemy. Southwell was convicted in 1842 for publishing a work called 'The Oracle of Reason;' Adams in the same year for selling it, and Holyoake for words spoken at a public meeting. But only popular accounts are preserved of these prosecutions (Odgers on Libel, 2nd ed. 445–6).

In the same year, however, we find more enlightened opinions

expressed by the judges of the House of Lords, in giving their opinions in the case of *Lady Hewley's Charities.*

In *Shore* v. *Wilson* (9 Cl. & Fin. 524–5), Mr. Justice Erskine said: "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such a purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. And I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries.

And Mr. Justice Coleridge said (p. 539): "I apprehend that there is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far we might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical rule, is that which I have pointed out, and which depends on the sobriety and reverence and seriousness with which the teaching or believing, however erroneous, are maintained."

In 1857 one Pooley was convicted of publishing a blasphemous libel, but was found to be insane (Odgers on Libel, 2nd ed. 446).

In 1882 and 1883 two prosecutions were instituted against the editor and proprietor of an obscure paper called the *Freethinker*, the publisher also being joined in one of the prosecutions. One of them was tried before Mr. Justice North, on March 1, 1883, when the jury disagreed; but a second trial took place four days later before the same judge, and resulted in the conviction of the accused, and sentences of three, nine, and twelve months' imprisonment. Mr. Justice North's charge to the jury has only been recorded in the daily papers, but he seems to have felt himself bound by the authorities which have been cited above. A few weeks later the second prosecution was tried before Lord

Chief Justice Coleridge, who had the advantage of the discussion evoked by the trials before Mr. Justice North. The jury disagreed on this occasion, and the prosecution was abandoned; but the judge's summing-up puts the law on a satisfactory footing. Lord Coleridge pronounced that the maxim that Christianity was part of the law of the land had long been abolished; that if the decencies of controversy were observed, the fundamentals of religion might be attacked, and that the law visited not the honest errors, but only the malice of mankind (Odgers on Libel, 2nd ed. 688; 48 L. T. 739; 15 Cox, C. C. 231; 1 C. & E. 126).

Present law on blasphemy.

This judicial statement of the law elicited further controversy, and many writers pointed out that the effect of the earlier decisions could not be obviated without legislative interference. Accordingly, bills for the amendment of the Blasphemy Laws have been constantly before Parliament during the last few years, but no Act has been passed, partly through press of other business, and partly through a natural difficulty to express in concise words the principles embodied in Lord Coleridge's somewhat long summing-up (see articles in the *Law Magazine and Review*, 1883–4, p. 158, and in the *Modern Review*, 1883, p. 586).

On this same point we m y refer to the cases deciding that trusts for the promotion of Judaism were illegal, before the Jewish Relief Act of 1846. These cases will be given below in the list of cases on religious trusts. The following cases are also in point:—

Other cases on illegal opinions.

Lawrence v. *Smith* (Jac. 471) (March, 1822, Lord Eldon). The plaintiff had obtained an interlocutory injunction to restrain the defendant from infringing the copyright of a work called 'Lectures on Physiology, Zoology, and the Natural History of Man.' The defendant moved to dissolve it on the ground that passages in the book impugned the doctrine of the immortality of the soul.

The Lord Chancellor said, that looking at the general tenor of the work, and at many particular parts of it; recollecting that the immortality of the soul is one of the doctrines of the

Scriptures; considering that the law does not give protection to those who contradict the Scriptures; and entertaining a doubt whether the book did not violate that law, he could not continue the injunction. He suggested that the plaintiff should try the question at law.

Briggs v. *Hartley* (1850, 19 Law J. Rep. (N.S.) Chanc. 416). A testator gave a legacy for the best essay on "Natural Theology," treating it as a science, and demonstrating the truth of the evidence upon which it was founded, and the perfect accordance of such evidence with reason, also demonstrating the adequacy and sufficiency of natural theology, when so treated as a science, to constitute a true, perfect, and philosophical system of universal religion. It was held that this bequest was void, as being inconsistent with Christianity.

Again, in *Cowan* v. *Milbourn* (L. R. 2 Ex. 230), decided in 1867, the plaintiff, who was the secretary of the Liverpool Secular Society, had agreed to hire, and the defendant had agreed to let, a certain lecture-hall. Subsequently the plaintiff announced the subjects of his lectures, one of which was, "The Character and Teachings of Christ; the former Defective, the latter Misleading." And another was, "The Bible shewn to be no more Inspired than any other Book; with a Refutation of Modern Theories thereon." The defendant, under pressure from some other quarter, refused to carry out his contract. The plaintiff claimed damages, but the decision was in favour of the defendant. It seems that the defendant did not know the intended subjects of the lectures when he entered into the contract, but the judgments do not proceed on that ground. Chief Baron Kelly said: "There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to maintain publicly the proposition I have mentioned" (*i.e.*, that the character of Christ was defective, and His teaching misleading), "is a violation of the first principles of the law, and cannot be done without blasphemy." And Bramwell, B., said: "I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use

them for the purpose of, 'by teaching or advised speaking denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority.' That he intended to use the rooms for the purposes declared by the statute (*i.e.*, the Blasphemy Act, 1697) to be unlawful is perfectly clear, for he proposed to shew that the character of Christ was defective, and his teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful; and if the defendant had known his purpose at the time of the refusal"—"refusal," here, is clearly a mistake for "contract"—"he clearly would not have been bound to let the plaintiff occupy them; for, if he would, he would have been compelled to do a thing in pursuance of an illegal purpose. Neither, if he had let the plaintiff into possession, could he, for the same reason, have recovered the price for the letting."

It is evident that an argument might be adduced in favour of the view that trusts for the promotion of religion are only valid in the cases of the Established Church, Jews, Roman Catholics, and such Protestant Dissenters as come within the Protestant Test Act; and that trusts for the promotion of that form of Unitarianism, Deism, or Theism, which rejects the authority of the Bible, are still invalid. But this distinction would be very difficult to draw in practice, and it has not been drawn. We shall see in the next chapter that trusts for Unitarian purposes have been held valid without any reference to the Protestant test (*Shrewsbury* v. *Hornby* (1846) (5 Hare, 406); *In re Barnett* (1860) (29 L. J. Ch. 871)); and in considering the validity of trusts for teaching quasi-religious subjects, the Court only inquires whether the teaching in question involves atheism, sedition, or immorality. On this point we may mention the following cases:—

Arguments for validity of trusts for Theism.

Thompson v. *Thompson* (1 Coll. 381) (Aug. 6, 1844, V.-C. Knight-Bruce).

Testator, a native of Scotland, appointed certain Scotch officials to be his trustees, and gave all his property to them,

and declared trusts of the income. One of these was as follows:—

"A sum not exceeding £50 a year shall be paid in quarterly payments to a literary man, preferably not less than forty years of age. This man shall be selected by the aforesaid trustees, and the annuity shall be continued to him for life, unless the trustees shall find reason, from his unfit or improper conduct, to discontinue him."

A further paper, incorporated with the will, added:—

"My object is to give assistance to a worthy literary person, who has not been successful in his career, and as far as possible to enable him to assist in extending the knowledge of those doctrines in the various branches of literature to which I have turned my attention and pen, in order to ascertain what appeared to be truth, and to teach it to those who would listen":

What vitiates a trust.

Held, according to the law of England, a good charitable bequest of £50 a year, supposing neither atheism, sedition, nor any other crime or immorality to be inculcated by the works; and, *held*, that the testator intended the charity to be established in Scotland, and an inquiry directed.

In *Russell* v. *Jackson* (10 Hare, 204) (1852) it was held that a testator left all his property to the defendants, upon trust, to establish a school for the education of children in the doctrines of socialism. This was held clearly void as to all but pure personal estate, whether the doctrines were a good charitable trust or an illegal trust, and for the purpose of deciding the right to the pure personal estate an inquiry was directed as to what was meant by the testator by the doctrines of socialism.

Pare v. *Clegg* (29 Beav. 589) (May, 1861, Romilly, M.R.) A society was formed under the Friendly Societies Acts, and its rules were certified. It afterwards joined another society, and the amalgamated society was called the Rational Society. The plaintiff lent money to the Rational Society, and eventually brought this action against its trustees to recover the money. An objection was raised that the society had illegal objects, and that money lent for illegal objects could not be recovered. It appeared that rule 20 stated:—

"For further exposition of the objects and principles of this society reference is made to the outline of the rational system of society by Robert Owen."

The outline thus referred to contained the following:—

"Art. 1. That all facts yet known to man indicate that there is an external or internal cause of all existences by the fact of their existence; that this all-pervading cause of motion and change in the universe is the power which the nations of the world have called God, Jehovah, Lord, etc.; but that the facts are yet unknown to man which define what that power is.

"2. That all ceremonial worship by man of this cause, whose qualities are yet so little known, proceeds from ignorance of his own nature, and can be of no real utility in practice; and that it is impossible to train men to become rational in their feelings, thoughts, or actions until all such forms shall cease." Abolition of ceremonial worship,

Another article stated that there should be no useless private property: and private property innocuous.

Held, that the society was not founded for the purpose of propagating irreligious and immoral doctrines in the ordinary and proper sense of the words; and was not such a society that a person dealing with it could not enforce a contract entered into with him by the society.

We may refer here also to the decision of Lord Romilly in *Thornton* v. *Howe* (May, 1862) (31 Beav. 14), where he affirmed a trust for publishing the writings of Joanna Southcote, saying that there was nothing in them likely to make persons immoral or irreligious. Joanna Southcote, though nominally a Christian, seems to have aimed at founding a new religion, with herself as its chief prophet. A trust for a new religion upheld.

CHAPTER X.

Cases on Religious Trusts.

Cases before Toleration Act.

We can now proceed to consider the cases which have been decided upon religious trusts.

Poor recusants.

Lady Egerton's Case (Duke, B. 126) (H. T. 1606). A fine was levied to A. upon trust for the relief of poor people, the intention being held to be, to relieve poor recusants, as they were called; it was held that this was not agreeable to the law, and the land was decreed to the heir of the donor. Compare *A.-G.* v. *Hughes* (2 Vern. 105), where a gift of immediate legacies to poor ejected ministers was held valid. But the trust in *Lady Egerton's Case* apparently created a perpetual endowment.

Croft v. *Evetts* (Mo. 784) (Nov. 16, 3 James 1, 1606). Feoffment to the use of feoffees upon trust to bestow the profits upon poor scholars at Oxford and Cambridge *or elsewhere*, such as study and profess divinity and enter into holy orders according to the true intent and meaning of the feoffor. The feoffor and feoffees were all popish recusants, as they were called. The trust was held void as a secret Roman Catholic trust; and the heir-at-law was held entitled. It will be seen that, according to later cases, the Crown would have the right to appoint the property to some lawful charity; but at the date of these cases the theory had not been invented, that a trust for the promotion of a forbidden religion shewed a general charitable intention with a mistaken application. On the contrary, we find a remarkable passage in Sir Francis Moore's disquisition on the Statute of Charitable Uses (temp. Jac. 1, Duke, B. 125), to the following effect:—

"But a gift of lands to maintain a chaplain or minister to celebrate divine service, is neither within the letter nor meaning

of this statute; for it was of purpose omitted in the penning of the Act, lest the gift intended to be employed upon purposes grounded upon charity, might in times of change (contrary to the minds of the givers) be confiscated into the King's treasury. For religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox may at another be accounted superstitious, and then such lands are confiscated, as appears by the Statute of Chantries (1 Edw. 6, c. 14)."

And a little later (Duke, B. 128), he says that schools for catechising are not charities, because religion is variable and not within the statute.

But this opinion of Sir Francis Moore was not adopted by the Courts. In *Pember* v. *Knighton Inhabitants* (Tothill, 34; Hearne, 101; Duke, B. 381; T. T. 1639) money was given to maintain a preaching minister, and it was urged that this was not a use named in the statute; but it was held to be a charitable use within the equity of the statute; and a similar decision was given in *Pensterd* v. *Pavier* (T. T. 1639; Tothill, 34). Duke, accordingly, writing in 1676, expresses an opinion contrary to that of Sir F. Moore, and suggests that trusts for the maintenance of a preacher, or the augmentation of a minister's stipend, are good charitable trusts, and so it has been held (Duke, B. 354; Duke, 105–113).

Religious trusts held to be charities.

When it was thus established that trusts for the promotion of religion were charitable trusts, a new complexion was thrown upon trusts for the promotion of religious views on which legal penalties were imposed.

An *Anonymous Case* is reported in 2 Freem. 40, immediately preceded by the date of M. T. 1678, but having the next succeeding date T. T. 1679, with only six cases intervening, and is as follows:—

"An annuity was devised to charitable uses intentionally, but the uses expressed were void; and thereupon the Lord Chancellor did decree it to be paid to such person as should be approved of by the Bishop of London, for expounding and catechising every

Saturday; and he cited a case in Lane's Reports, where a pension was given to silenced ministers, and decreed by the Barons of the Exchequer to poor conforming ministers." The report adds that the arrears were ordered to be invested.

The editor of Freeman's Reports suggests *Wickham* v. *Wood* (Lane, 113) as the case here referred to, but that case does not appear to answer this description, nor does any case in Lane, while *Gates and Jones Case* (cit. 2 Vern. 266), and mentioned below, looks more like the case referred to.

This *Anonymous Case* in Freeman bears certainly a marvellous resemblance to the case of *A.-G.* v. *Combe* (2 Ca. Ch. 18) (February, 1679), where an annuity was given so long as there should be a weekly sermon every Saturday in S., to be chosen by the greatest part of the best inhabitants, and the like for a lecture in H., etc.; and it was applied to a catechist to be chosen by the Bishop. The judgment also refers to a case "where a gift was to maintain a superstitious institution so long as the law would allow, turned, when the law did abrogate that superstition, to a good use." The report also mentions that a direction was given to invest the arrears of the annuity.

When religious trust illegal, Crown appoints.

We can hardly expect to find these early cases all consistent in principle; but if we regard the trust in this case as a trust for the promotion of lawful religious views with an impracticable condition annexed, the decision is in accordance with the bulk of the authorities. But if we consider the trust to have been for the promotion of forbidden religious views, then the later authorities recognise the Crown as being entitled to settle the application of the fund. Thus we find *Gates and Jones Case* cited in 2 Vern. 266 as a case decided in the Exchequer, and affirmed in the House of Lords, in which a charity given to maintain popish priests was applied to other uses by the king, and not to turn to the benefit of the heir.

We next come to a memorable case, namely *A.-G.* v. *Baxter* (1 Vern. 248) (June 7, 1684, Lord Keeper). A clergyman by will left £600 to Mr. Baxter, to be distributed by him amongst sixty pious ejected ministers, adding, "I would not have my

charity misunderstood. I do not give it to them for the sake of their Nonconformity, but because I know many of them to be pious and good men and in great want." He also gave Mr. Baxter £20, to be laid out in a book of his intituled Baxter's 'Call to the Unconverted.' The Lord Keeper held the trust for ejected ministers to be void, but he considered that the fund was impressed with a general charitable intention; and he therefore ordered it to be applied for the maintenance of a chaplain at Chelsea Hospital.

This case was, however, re-heard after the Revolution of 1688 (*A.-G.* v. *Hughes*) (2 Vern. 105) (June 8, 1689), and the money was ordered to be paid to Mr. Baxter, to be distributed according to the will, on the ground that it was a private and not a charitable bequest. We shall mention this case again, in considering the question when legacies to ministers and other officials are given to them in their private capacity, and when they have the charitable purpose of making an endowment for the office.

In the interval between the first and second hearings of *Baxter's Case*, the case of *A.-G.* v. *Ryder* occurred (2 Ca. Ch. 178) (Oct. 1686). There we read: "Six hundred pounds devised for ejected ministers. The king had the disposal of the money." If the legacy was tainted with a forbidden religious trust, this result would be legally correct; but we think the case must be regarded as overruled by *A.-G.* v. *Hughes*.

Cases after Toleration Act.

A.-G. v. *Guise* (2 Vern. 266) (May, 1692). Testator charged his real and personal estate with an annual sum for the maintenance of Scotchmen at Oxford, to be sent into Scotland to propagate the doctrine and discipline of the Church of England there. The Presbyterian Church had just been established in Scotland. Eventually the land was directed to be conveyed to the fellows of Balliol College, Oxford, being one of the colleges mentioned in the will, for the effectual execution of the trust as near as could be to the said will and intention. The Court therefore apparently considered that there was nothing illegal in promoting Episcopalian views in Scotland. Since the Tole-

Episcopal trusts good in Scotland.

ration Act there has been nothing illegal in promoting Presbyterian views in England.

And Nonconformist trusts good in England.

A.-G. v. *Hickman* (2 Eq. Ab. 193, Trin. T. 5 G. 2) (1731). Testator by will gave his estate to B., and, by an unattested codicil, added: "I would have the same employed for the encouraging such Nonconformist ministers as preach God's Word in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging the bringing up some to the work of the ministry who are designed to labour in God's vineyard among the Dissenters; the particular method how to dispose of it I prescribe not, but leave it to their discretion, designing you (*i.e.* B.) to take advice of C. and D." B., C., and D., all died before the testator:—*Held*, that Nonconformists and Dissenters meant those within the Toleration Act; that the trust was a good charity; that it was not affected by the deaths of B., C., and D.; and that the property should be distributed at once, and not made a perpetual endowment (see a note of the judgment set out, 7 Ves. 80).

Lloyd v. *Spillet* (2 Atk. 148) (March, 1740, L. C. Hardwicke), affirming a decree made November 8, 1734 (3 P. Wms. 344). Testator, by will dated March 28, and codicil dated October 10, 1721, directed that the yearly profits of his estate should be given to the yearly maintenance of such ministers as were called by the name of Presbyterian and Independent ministers, that did not receive above £40 a year for their preaching:—*Held*, a good charity.

A.-G. v. *Cock* (2 Ves. 273) (May 4, 1751, Sir John Strange, M.R.). It was argued in this case that perpetual trusts for Nonconformist bodies were not good charities; but the decision was against that argument so far as concerned all who came under the Toleration Act.

Jewish trusts void until 1846.

De Costa v. *De Pas* (Ambler, 228) (May 8, 1754, L. C. Hardwicke). A Jew by will left £1200 to be appropriated in order to apply and dedicate the revenue of that sum towards establishing a Jesuba or assembly for reading the law, and instructing people in his holy religion:—*Held* void. Also, that being a

charity, of which the mode of disposition could not take effect, in promoting a religion contrary to the established one, the Crown might direct its disposition in charity by sign-manual.

The Crown accordingly directed £1000 of it to be applied in paying a preacher at the Foundling Hospital to instruct the children in the Christian religion.

Isaac v. *Gompertz* (cit. 7 Ves. 61) (July 17, 1786, Lord Thurlow). *Isaac* v. *Gompertz*, a remnant of *De Costa* v. *De Pas*, was before Lord Thurlow, 17th July, 1786, who allowed every legacy, except an annuity given for the support and maintenance of the Jewish synagogue in Magpie Alley. The decree declares it is not to accrue to the personal estate, but to be applied to some charitable use by the Crown; and recommended the Attorney-General to apply to the Crown for a sign-manual. It is stated in a note to *A.-G.* v. *Berryman* (1 Dick. 168) that in *Isaac* v. *Gompertz* half was appointed to the Magdalen Hospital and half to the London Infirmary.

Roman Catholic trusts void till 1832.

De Garcia v. *Lawson* (4 Ves. 433, n.) (July 3, 1798). In this case, which has already been mentioned under the head of Superstitious Trusts, one legacy was held void, which was not superstitious, but for the maintenance of a Roman Catholic minister for ever. The question was argued whether the Crown had the right to dispose of it; but the whole estate seems to have gone in costs, and no decision was given.

Cary v. *Abbot* (7 Ves. 490) (Aug. 3, 1802, M.R.) Testator bequeathed in trust to his executors the residue of his personal estate, adding, "Also all the interest arising therefrom I give for the purpose of educating and bringing up poor children in the Roman Catholic faith":—*Held*, void; and held that the next of kin were not entitled to the residue, but the Crown could dispose of it for any other charitable purpose by sign-manual.

A.-G. v. *Fowler* (15 Ves. 85) (May, 1808, L. C. Eldon). An information and bill by ten out of twelve lessees in trust of a Protestant dissenting chapel against the two others, and motion for a receiver of the pew-rents. Objection, that it was not a charity, but a voluntary private association, and therefore the

Attorney-General could not sue. But held, that it was a charity, and the suit was therefore properly framed.

In *A.-G.* v. *Wansay* (15 Ves. 231) (July, 1808), bequest in 1699 of £200 to the congregation of Presbyterians at Salisbury, on trust for investment in land, the income to be applied in putting out as apprentices two poor boys of such as were members of the congregation and lived in the parish of M.

The income increased, and the increase was directed to be applied for sons of Presbyterians elsewhere, and not for sons of persons in the parish of M. who were not Presbyterians.

A.-G. v. *Power* (1 Ball & Beatty, 145) (April 21, 1809, L. C. Manners, Ireland). Bequest to two Roman Catholic bishops and their successors on trust, to apply the interest of £2000 "in clothing such poor children as shall or may from time to time be educated in, or admitted into, the school of the nunnery at Waterford:—*Held*, void if the school was for teaching the Roman Catholic religion, and an inquiry directed accordingly. *Held*, that the two bishops were properly appointed the first two trustees, though the trusteeship could not devolve on their successors, as they were not corporations.

Effect of change of views of congregation.

A.-G. v. *Pearson* (3 Mer. 353) (July, 1817, L. C. Eldon). A chapel had been founded in 1701 for the worship and service of God. In the course of time Unitarian doctrines were preached there, and a minister was elected in 1813 who preached such views. After a few years he began preaching Trinitarian views, whereupon the acting trustees desired to dismiss him, and brought an action of ejectment. He and his friends then brought this information, and moved for an injunction to restrain the trustees from ejecting him:—*Held*, that an injunction should be granted, the main ground of decision being that, as Trinitarian nonconformity alone was lawful in 1701, the chapel must be presumed to have been founded for Trinitarian preaching.

This information was brought to a hearing in April, 1822, and a decree made, but not drawn up, directing various inquiries (7 Sim. 294, 295). In 1833 another information was filed, and

a decree was made therein based on the ground of decision above mentioned, declaring that the property ought not to be applied to the support or teaching of the doctrines of any sect of Protestant Dissenters who denied the doctrine of the holy Trinity, or professed opinions as to the Christian religion which, at the time of the erection of the chapel, could not be legally taught or preached therein: *A.-G.* v. *Pearson* (7 Sim. 290) (March 6, 1835, V.-C. Shadwell).

It will be seen below that the principle of decision in this case has now been altered by statute (7 & 8 Vict. c. 45).

De Themmines v. *De Bonneval* (5 Russ. 288) (Nov. 1828, M.R.). The plaintiff invested stock in the names of the defendants on trust for himself for life, and then on trust to apply the dividends in circulating a certain book in any part of the world, either in Latin or French, with power to hand over the capital to any college or university to establish a chair to teach the principles of the book; provided that if any of these trusts should be declared void, the funds should be held on trust for the plaintiff. The plaintiff now reclaimed the stock.

Perpetual political religious trust void.

The judge having read the book said: "Its object is to shew that according to the admitted doctrines of the Roman Catholic Church the Pope has, in all ecclesiastical matters, a supremacy which he is not at liberty to alienate or to subject to the temporal sovereign, and that Pius VII., by his concordat with the Government of France, did alienate it in opposition to all the principles which that church holds most sacred":

Held void, it being against the policy of the law to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the Pope in ecclesiastical matters over the sovereignty of the State.

Held, also, that the condition was good, and the plaintiff entitled to the stock.

It would seem that this case is still law. The book was, in fact, not religious but political; and a trust to keep up a particular political opinion is not a charity.

Bradshaw v. *Tasker* (2 My. & K. 221) (May, 1834, L. C.

Brougham). Testator gave his executors £300 upon trust to pay the same to the person who called himself the treasurer, or to those who called themselves the trustees of the Catholic school in W., which sum he ordered to be applied for the use of and towards carrying on the good designs of the said school. He gave another sum of £200 upon like trusts for the benefit of the Catholic school at L.

Roman Catholic trusts valid since 1832.

Testator died on May 6th, 1823. His estate was administered by the Court, and the amounts of the legacies were set aside, but the trustees of the schools were not in any way before the Court. Then the Act 2 & 3 Will. 4, c. 115, was passed; and after that the trustees of the schools petitioned for payment of the legacies to them:

Held, that they were entitled to such payment, the Act being retrospective except as to pending litigations.

West v. *Shuttleworth* (2 My. & K. 684) (April, 1835) has been mentioned already under the head of superstition. In it a gift for the promotion of the Roman Catholic religion was held good under the Act 2 & 3 Will. 4, c. 115.

A.-G. v. *Todd* (1 Keen, 803) (April 10, 1837, Lord Langdale, M.R.). An information was filed before the Roman Catholic Relief Act (2 & 3 Will. 4, c. 115), respecting a trust for the Roman Catholic religion created in 1680, by a will giving a rent-charge, and a paper declaring trusts of it:—*Held*, that the trusts being for the promotion of the Roman Catholic religion were originally void, and were not made good by the Roman Catholic Relief Act, since property the subject of pending litigation was excepted out of it. The Crown was therefore held entitled to appoint the property.

The case of *Strauss* v. *Goldsmid* (8 Sim. 614) (Aug. 1837) has been already mentioned under the head of Superstition. A Jewish religious trust was somehow held good before the Jewish Relief Act.

A.-G. v. *Shore* (11 Sim. 592) (May 9, 1843, V.-C. Shadwell). A trust created in 1704 by Lady Hewley, for preachers of the gospel and their widows, was found in the hands of Unitarian

trustees. Evidence was given of the intention of the original founder, and thereupon the Unitarian trustees were removed, and Presbyterians and Congregationalists were appointed.

Another hard case on changed views.

This case was originally decided by the Vice-Chancellor on Dec. 23, 1833; it was affirmed by Lord Lyndhurst on Feb. 5, 1836 (7 Sim. 309, n.); it was then taken to the House of Lords, and again affirmed on Aug. 5, 1842 (*Shore* v. *Wilson*, 9 Cl. & Fin. 355).

The hardship of this case and of the earlier case of *A.-G.* v. *Pearson* was very great. Many chapels had been founded under the Toleration Acts before Unitarianism was brought within them, and the ministers and congregations of these chapels had gradually come to hold Unitarian views. It was felt that in justice they were entitled to retain their chapels and endowments, and as the law did not effect this end, an alteration was desirable. The result was that the Act 7 & 8 Vict. c. 45, was passed (9th July, 1844).

The Chapels Act, 1844.

This Act recites the Toleration Act (1 W. & M. s. 1, c. 18), and the Acts extending the same (19 Geo. 3, c. 44; 53 Geo. 3, c. 160); an Irish Act of 6 Geo. 1; and the Act for Ireland (57 Geo. 3, c. 70); and then continues:—

"And whereas prior to the passing of the said recited Acts respectively, as well as subsequently thereto, certain meeting-houses for the worship of God, and Sunday or day schools, not being grammar schools, and other charitable foundations, were provided or used in England and Wales and Ireland respectively, for purposes beneficial to persons dissenting from the Church of England and the Church of Ireland, and the United Church of England and Ireland respectively, which were unlawful prior to the passing of those Acts respectively, but which by those Acts respectively were made no longer unlawful:

"Be it therefore enacted, etc., That with respect to the meeting-houses, schools, and other charitable foundations so founded or used as aforesaid, and the persons holding or enjoying the benefit thereof respectively, such Acts, and all deeds and documents relating to such charitable foundations, shall be

construed as if the said Acts had been in force respectively at the respective times of founding or using such meeting-houses, schools, and other charitable foundations as aforesaid.

"2. And be it enacted, that so far as no particular religious doctrines, or opinions, or mode of regulating worship, shall on the face of the will, deed, or other instrument declaring the trusts of any meeting-house for the worship of God by persons dissenting as aforesaid, either in express terms or by reference to some book or other document as containing such doctrines or opinions, or mode of regulating worship, be required to be taught or observed, or be forbidden to be taught or observed therein, the usage for twenty-five years immediately preceding any suit relating to such meeting-house of the congregation frequenting the same, shall be taken as conclusive evidence that such religious doctrines or opinions or mode of worship as have for such period been taught or observed in such meeting-house may properly be taught or observed in such meeting-house; and the right or title of the congregation to hold such meeting-house, together with any burial ground, Sunday or day school, or minister's house attached thereto; and any fund for the benefit of such congregation, or of the minister or other officer of such congregation, or of the widow of any such minister, shall not be called in question on account of the doctrines, or opinions, or mode of worship so taught or observed in such meeting-house: Provided, nevertheless, that where any such minister's house, school, or fund as aforesaid shall be given or created by any will, deed, or other instrument, which shall declare in express terms, or by such reference as aforesaid, the particular religious doctrines or opinions for the promotion of which such minister's house, school, or fund is intended, then and in every such case such minister's house, school or fund shall be applied to the promoting of the doctrines or opinions so specified, any usage of the congregation to the contrary notwithstanding."

A third section applies the benefit of the Act to any information pending at the time of its passing.

Walsh v. *Gladstone* (1 Phil. 290) (Dec. 1843, L. C. Lynd-

hurst). A legacy of £4000 to a Roman Catholic college was paid to the president of the college, on evidence being given of the constitution of the college, shewing that it was unnecessary to direct a scheme. By the will it was given to a trustee for the use of the college, but the trustee died in the testator's lifetime.

Unitarian trusts valid.

Shrewsbury v. *Hornby* (5 Hare, 406) (May, 1846, V.-C. Wigram). Testator, by will dated August 31, 1837, after giving his wife a government annuity of £300 for her life, appointed T. Hornby, the treasurer of the Unitarian Association, or the treasurer of such Association for the time being, trustee of that annuity, with a request that he and his committee would give to the Unitarian chapel at Devonport £100 a year during the continuance of the annuity, and that the remaining £200 a year might be applied, in sums of £20 annually, to the assistance of respectable Unitarian congregations who stood in need of it. There was a further bequest of leaseholds for the support of a Unitarian missionary, and a clause saying that if these Unitarian bequests should be attacked as illegal or be declared void, the testator gave the subjects of them to the plaintiff and others. The defendant admitted that the gift of the leasehold failed; but the plaintiff contended that the gift of the annuity failed also as being a gift for the benefit of a religious sect, "who impugn and deny the doctrine of the Trinity and the Godhead of Christ."

The Vice-Chancellor held that the bequest of the government annuity of £300 to the defendant upon the trusts mentioned in the will, subject to the life interest given to the widow, was a valid bequest, and ought to be carried into execution.

Apparently the testator possessed a government annuity of £300 per annum for a long term of years.

Irvingite trust valid.

A.-G. v. *Lawes* (8 Hare, 32) (Nov. 1849, V.-C. Wigram). Bequest: "I direct my executors to pay unto Messrs. D., bankers, a clear yearly sum of £100 for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or

in poverty, for preaching or upholding those doctrines, or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman Street" :

Held, a good charitable gift of a perpetual annuity. *Semble*, if it should ever happen that there were no objects of the gift, it would be applied *cy-près*.

Messrs. D. refused to accept the trust, and a scheme was ordered to be settled.

Jewish trust valid.

In re Michel's Trusts (28 Beav. 39) (March, 1860) has already been mentioned in the chapter on Superstition. A Jewish religious trust was then held good, the Jewish Relief Act having been passed.

In re Barnett (L. J. 29 Ch. 871) (July, 1860, Romilly, M.R) Will: "I bequeath the sum of £500 sterling to the minister or ministers at the time of my death of the Unitarian chapel in Cross Street, Manchester, England, to be applied in such manner as he or they shall think fit towards the support of the Unitarians."

Testator died in March, 1859. There were then two ministers of the chapel, one of whom resigned a few days after the testator died, and another had since been appointed in his place. The fund having been paid into court, the two ministers officiating at the testator's death petitioned for it:

Held, that it should be paid to them, without any scheme. And no order made as to costs.

Trust for Joanna Southcote's works valid.

Thornton v. *Howe* (31 Beav. 14) (May, 1862, Sir J. Romilly, M.R.). Testatrix gave the residue of her estate (which turned out to be all realty) to the defendant, with a trust annexed that the produce of the whole should be applied for and towards the printing, publishing, and propagation of the sacred writings of the late Joanna Southcote.

The judge read the writings and found "that there is nothing in them which is likely to corrupt the morals of her followers, or make her readers irreligious. She was a foolish, ignorant woman, who wished to become an instrument in the hands of God, to promote some great good on earth. At last she came to believe

that her wish was accomplished, and that she had been selected by the Almighty for this purpose. In her personal disputations and conversations with the devil, her prophecies and her intercommunings with the spiritual world, much is very foolish, but nothing likely to make persons immoral or irreligious " :

Held, therefore, not void on the ground of public policy. But *held*, a charity, any bequest for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, being a charity. " The fact that the Court considers the opinions foolish or devoid of foundation makes no difference." " It is clear that Joanna Southcote was a very sincere Christian; but she laboured under the delusion that she was to be made the medium of the miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion on earth would be occasioned."

The gift was therefore void so far as it was to take effect out of land.

Name does not define doctrines.

A.-G. v. *Bunce* (L. R. 6 Eq. 563) (April 22, 1868, V.-C. Malins). Under wills dated between 1716 and 1803 various funds were bequeathed for the Presbyterian chapel at D. In the course of time the minister and congregation had become Baptists, and had been so for more than twenty-five years :— *Held*, that the term " Presbyterian " did not define any particular doctrines, and the Baptist congregation were entitled to the funds. *Held*, also, that independently of the Act 7 & 8 Vict. c. 45, as there had been no Presbyterian congregation for many years, the funds would be applied *cy-près* to the congregation in possession.

Summary of cases.

The result of these cases is that trusts for the promotion of the religious views of Protestant Dissenters, *A.-G.* v. *Hickman* (1731) (2 Eq. Ab. 193); *Lloyd* v. *Spillet* (1740) (2 Atk. 148); *A.-G.* v. *Fowler* (1808) (15 Ves. 85); *A.-G.* v. *Pearson* (1817) (3 Mer. 353); (1822) (7 Sim. 294) (1835) (7 Sim. 290); Unitarians, *Shrewsbury* v. *Hornby* (1846) (5 Hare, 406); *In re Barnett* (1860) (L. J. 29 Ch. 871); Roman Catholics, *Bradshaw*

v. *Tasker* (1834) (2 M. & K. 221); *West* v. *Shuttleworth* (1855) (2 M. & K. 684); *Walsh* v. *Gladstone* (1843) (1 Phil. 290); Jews, *In re Michel's Trusts* (1860) (28 Beav. 39); Irvingites, *A.-G.* v. *Lawes* (1849) (8 Hare, 32); Southcoatians, *Thornton* v. *Howe*) (1862) (31 Beav. 14); and Episcopalians in Scotland, *A.-G.* v. *Guise* (1692) (2 Vern. 266), have all been held to be valid.

Moreover, in the case of Unitarian trusts, no attempt has been made to distinguish purposes within and purposes without the Protestant Test Act.

CHAPTER XI.

Of Gifts for the Benefit of Ministers.

As gifts for the promotion of any lawful form of religion are charitable gifts, a question arises upon every gift for the benefit of a minister or ministers of religion as to whether it is given to the legatee as an individual, or in his official capacity, to be employed in promoting his religious views.

Principles deduced from the cases.

On this subject the authorities appear to lead to the following conclusions:—

(1.) That a gift of an immediate sum of money to one or more ministers selected by the testator, and designated either by name or by the description of the holders of certain offices at his death, is a gift to them in their private capacity (*Donnellan* v. *O'Neill* (1870) (I. R. 5 Eq. 525)).

(2.) That the case is the same with a gift to ministers to be selected by some one named by the testator (*A.-G.* v. *Hughes* (1689) (2 Vern. 105); *Thomas* v. *Howell* (1874) (L. R. 18 Eq. 198)).

(3.) That a gift to persons holding a charitable office, with power for them to appoint its use, is not a charity (*Doe* d. *Toone* v. *Copestake* (1805) (6 East. 328)), and a gift of money to such persons with an intimation that they are to apply the money for some purpose which the testator intends to declare, but does not declare, is neither a charitable gift, nor a gift to them as individuals, but an incomplete trust, which fails (*Aston* v. *Wood* (1868) (L. R. 6 Eq. 419)).

(4.) That a gift to support ministers in general (*Lloyd* v. *Spillet* (1734) (3 P. Wms. 344)), or the minister or ministers of any particular place (*A.-G.* v. *Cock* (1751) (2 Ves. 273)),

Doe d. *Phillips* v. *Aldridge* (1791) (4 T. R. 264)) for ever, or for a term of years, or other enduring interest, is a charity, if they teach a lawful religion (*Anon.* (1680) 2 Vent. 349); *Gibson* v. *Representative Church Body* (1881) (L. R. Ir. ix. 1)), and otherwise void (*Lady Egerton's Case* (Duke, B. 126)).

(5.) That the question of whether the testator intends a fund to be distributed at once, or invested to form a permanent endowment, must be settled by paying attention to all parts of his will (*A.-G.* v. *Gladstone* (1842) (13 Sim. 7)).

(6.) In the case of a perpetual gift to a minister and his successors in such a way as to offend the Georgian Mortmain Act, the whole fails (*Grieves* v. *Case* (1792) (1 Ves. J. 548); *Thornber* v. *Wilson* (1855) (3 Drew. 245)), unless a life estate can be severed from the gift for the benefit of the first taker (*Doe* d. *Phillips* v. *Aldridge* (1791) (T. R. 264)); and consider *Robb* v. *Dorrian* (1877) (I. R. 9 C. L. 483), and *Gibson* v. *Representative Church Body* (1881) (L. R. Ir. ix. 1).

Cases in order of date.

The following are the cases from which the principles abovementioned may be deduced, arranged again in chronological order.

Anon. (2 Vent. 349) (E. T. 1680). An impropriator devised to one that served the cure and to all that should serve the cure after him all the tithes and other profits, &c. Though the curate was incapable to take by this demise in such manner, for want of being incorporate, and having succession, yet my Lord Chancellor Finch decreed that the heir of the devisee should be seised in trust for the curate for the time being.

Curate and successors.

NOTE.—"Devisee" should probably be "devisor."

A.-G. v. *Hughes* (2 Vern. 105) (1689), which has been mentioned already under the head of Religion, reversing *A.-G.* v. *Baxter* (1 Vern. 248), and overruling *A.-G.* v. *Ryder* (2 Ca. Ch. 178). It appears from a note of Lord Hardwicke's, stated in the judgment in *Moggridge* v. *Thackwell* (7 Ves. 76), that the Court considered the gift in this case to be a private one, and not a charity for a particular class of poor persons. In the latter aspect it is opposed to *Lady Egerton's Case* (Duke, B. 126),

Immediate gift, private.

where a perpetual trust for the relief of poor recusants was held illegal and void. But the gift in *A.-G.* v. *Hughes* was immediate, and not a perpetual trust.

Lloyd v. *Spillet* (3 P. Wms. 344) (1734) affirmed (2 Atk. 148) (1740), which has been also stated in the list of cases on Religion. A provision for the permanent endowment of ministers was held a good charity.

A.-G. v. *Cock* (2 Ves. 273) (May, 1751, Sir John Strange, M.R.). Testatrix, who died before the Georgian Mortmain Act, gave a legacy of £50 to P. J., the master or pastor at the meeting-house at M., and also gave to W. Cock and his heirs certain land "chargeable nevertheless with an annuity of £10 per annum, which I give to the minister belonging to the meeting-house at M. aforesaid, but if the said house at M. should not be used as a meeting-house after my decease, then to the minister of any other place the Protestant Dissenters called Baptists shall meet in, provided it be in the parish of H.;" and the testatrix gave power to the minister to enter on the land and distrain:

Pastor of chapel and successors.

Held, a perpetual rent-charge to the Baptist minister for the time being, and a good charity.

Doe d. *Phillips* v. *Aldridge* (4 T. R. 264) (May, 1791, Lord Kenyon and Sir N. Grose). Devise: "To the Rev. A. Aldridge, now preacher at the meeting-house in L., to hold to him, the said A. Aldridge, for and during his natural life only, on this express condition, that he do, and shall without delay after my decease settle and convey the same to trustees, to take place at his decease, for the use and support of the preaching of the Word of God at the meeting-house at L. aforesaid for ever; and in case such preaching should be discontinued, I direct the same to be applied towards a school for teaching the poor children of L. aforesaid for ever. And I do hereby give unto the said A. Aldridge full and absolute power and authority to settle the same accordingly." Testator also said, "And I further expect that he (*i.e.* A. Aldridge) will, with the help of God, after my decease, without delay, settle and forward everything in his

A severable life estate.

power to promote and carry on the work of God at L. aforesaid, both in his lifetime and after his decease" :

Held, that the defendant took a good life estate, though the subsequent limitation was void. The life estate was not void at law under the Georgian Mortmain Act.

Grieves v. *Case* (1 Ves. Jun. 548) (July, 1792, Eyre and Ashurst Commissioners). Testatrix directed £600 to be laid out in lands as soon as possible, and in the meantime placed out at interest, on trust to have the lands conveyed to the trustees of Fakenham Chapel, and on trust out of the interest and rents to pay several small life annuities, the residue of the interest and rents, to be paid in equal moieties to M., of B., teacher of the gospel, for his life, and E., of F., ditto, for life, and after death of M., one-third part to the preacher for the time being of the chapel of B., and the other two-thirds to E. for life, he and the said preacher exchanging upon Lord's Days alternately, provided that M. and E. did not voluntarily withdraw from and refuse officiating when able at F. chapel as usual; if they do so, during such recess the share of him or them refusing to cease, and go to the preachers appointed in his or their room, and after the death of M. and E., and the survivor of them, the interest or rents to be paid for ever to the preacher for the time being of F. and B. chapels, two-thirds to F. and one-third to B.; and she desired that E. should not continue to preach at F. or enjoy the benefit given by her will if he ceased to preach the gospel:

Life interest not severable.

Held, good as to the annuities, but bad as to M., E. and the rest, by reason of the Georgian Mortmain Act.

Smart v. *Prujean* (6 Ves. 560, 567) (Dec. 11, 1801, L. C.) In this case, which has been already mentioned under the head of Superstition, the Lord Chancellor expressed an opinion that a legacy of £100 for such purposes as the superior of a convent, or her successor, should judge most expedient, being given in that character, was sufficient to shew it was for a superstitious use. But the legacy failed from being in a document not properly incorporated into the will.

Superior of convent.

Doe d. *Toone and West* v. *Copestake* (6 East, 328) (May, 1805,

Lord Ellenborough, C.J.). Testator gave land to his wife for life, and afterwards to the plaintiffs on trust to pay certain legacies, adding that the overplus was "to be applied by the said trustees and the officiating ministers of the congregation, or assembly of the people called Methodists, that now usually, or that shall for the time being assemble at L., and as they shall from time to time think fit to apply the same; with a direction to keep up a succession of trustees:

Indefinite words not charitable.

Held, that the plaintiffs were entitled to recover the land at law, without prejudice to any question about the beneficial interest in equity. (NOTE.—The trust of the overplus would seem to be void as a perpetuity.)

A.-G. v. *Gladstone* (13 Simon, 7) (June, 1842, V.-C. Shadwell). Testator gave six legacies, of which the first four and the last were charitable, and the fifth was, "I also give to the said R. the further sum of £15,000, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion." After the last legacy was added, "all which beforementioned pecuniary legacies I direct to be paid immediately after my decease out of such part of my personal estate as is legally applicable thereto."

A gift held perpetual.

R. died in the testator's lifetime:

Held, that this legacy was intended to create a perpetual charitable trust, which did not fail by the death of the trustee, but would be executed by the Court by means of a scheme.

It is certainly difficult to see how this conclusion was arrived at. The testator appears to have intended an immediate gift, and to have thought that such a gift was charitable. It is curious that the existence of other charitable gifts in the will should cause an immediate gift to be turned into a perpetual one.

Pennington v. *Buckley* (6 Hare, 451) (Nov. 1848, V.-C. Wigram). A trust for unbeneficed curates in the deanery of B. whose annual salary and income does not exceed £35, and such as should be recommended by a plurality of voices of the beneficed clergy of the deanery. There were none whose annual salary did not exceed £35:

Curates.

Held, that the trust was good for those that should be recommended as mentioned.

No life estate severable.

Thornber v. *Wilson* (3 Drew. 245) (April, 1855) (and 4 Drew. 350) (Nov. 1858, V.-C. Kindersley). Testator devised house A to his wife for life, and after her death "to the then minister of the Roman Catholic chapel at L., and his successors, ministers of the same chapel, for ever, as an addition to the stipend of such chapel; and he gave estate B. to T. W., minister of the Roman Catholic chapel at K., and his successors, for ever. And he gave to the officiating minister of the last-named chapel, for and during the term of seven years next after his death, the rents and profits of field C. There was also a residuary devise on trust to sell, pay debts, &c., and, subject thereto, for the then minister of the last-named chapel, whom he made his residuary devisee.

It was held that all these gifts were official and not private gifts, and that the three specific devises were wholly void, and so was the gift of the residue, so far as such residue consisted of land. The judge considered that in all these cases the testator intended to benefit the chapel, and not to make a personal bequest.

Unattested document rejected.

Aston v. *Wood* (L. R. 6 Eq. 419) (July, 1868, V.-C. Giffard). Testator bequeathed: "I give to the trustees of Z. chapel, where I attend, £3500, and appoint as trustees to the same A. and G., and I direct that their receipt shall be a sufficient discharge to my executors, and the money to be appropriated according to statement appended." A statement was found among the testator's papers appropriating £3500 to charitable purposes, but it was not appended to the will, and had been refused probate:

Held, that the Court could not presume a charitable purpose, and the trust, therefore, failed for being indefinite.

Gift to a cardinal.

In *Donnellan* v. *O'Neill* (I. R. 5 Eq. 525) (July, 1870) there was a simple gift to Cardinal Cullen, and this was held to be a private gift, and not a charitable gift.

Thomas v. *Howell* (L. R. 18 Eq. 198) (March, 1874, V.-C. Malins). Testator gave "to each of ten poor clergymen of the

Church of England, whether holding benefices or not, to be selected by my friend O., if alive, or, if dead, then by the acting executors or executor of my will, and in his or their judgment not holding High Church or Puseyite doctrines, £200": Immediate gift.

Held, not a charity, but a good private bequest.

In *Robb* v. *Dorrian* (I. R. 9 C. L. 483) (Dec. 1875, and on appeal, Feb. 1877) (I. R. 11 C. L. 293) there was a devise of land "to the Right Rev. P. Dorrian, Roman Catholic Bishop of Down and Connor, and his successor in said bishoprick." Devise to Roman Catholic bishop and successors.

The judges differed as to whether this gave the defendant a life estate, or the fee, for his own use, or was intended as a perpetual endowment of the bishoprick; but they held, on other grounds, that the plaintiffs had no right to the land in any case.

Gibson v. *Representative Church Body* (L. R. Ir. ix. 1) (July, 1881). Bequest by a codicil: "I bequeath to the Representative Body of the Church of Ireland the sum of £1000, £500 thereof for the parish church of L., and £500 for the Rotunda Chapel, Dublin, upon trust to invest the same as they shall think best, and to pay the annual income arising from £500 to the incumbent of the parish church of L. at the time of my decease during his life, and to his successors in said parish, and to pay the annual income of the remaining £500 to the chaplain of the Rotunda Chapel at the time of my decease during his life, and to his successors in said chaplaincy." Life means during office.

Testatrix afterwards revoked a certain legacy of £500, and gave £200 to M., and added, "I bequeath to my dear friend, the Rev. B. G., chaplain of the Rotunda Hospital, the remaining sum of £300, both free of legacy duty, for his own personal use, and over and above and independent of the bequest made by a former codicil in favour of the chaplain of said hospital."

B. G. was chaplain of the Rotunda Hospital at the time of the death of the testatrix, but he afterwards resigned that position:

Held, that the income of the £500 was only payable to B. G. so long as he remained chaplain of the hospital, and that after his resignation it was payable to his successor.

CHAPTER XII.

On Gifts for the Benefit of the Poor.

Summary of cases.

Gifts to the poor in general (*A.-G.* v. *Rance* (1728) (1 Amb. 422)), or to the poor of any particular place or places (*A.-G.* v. *Clarke* (1762) (Amb. 422); *In re Campden Charities* (18 Ch. D. 310)); or the poor on certain farms (*Bristow* v. *Bristow* (1842) (5 Beav. 289); *A.-G.* v. *Corporation of Exeter* (1827) (2 Russ. 45; 3 Russ. 395)), are good charitable gifts; and so are gifts to poor ministers, maidens, boys, and the like (*A.-G.* v. *Clegg* (1738) (Amb. 584)).

Gifts to widows (*Powell* v. *A.-G.* (1817) (3 Mer. 48); *A.-G.* v. *Comber* (1824) (2 Si. & Stu. 93); *Collinson* v. *Pater* (1831) (2 R. & M. 344)), orphans (*A.-G.* v. *Comber* (1824) (2 Si. & Stu. 93)), children (*Powell* v. *A.-G.* (1817) (3 Mer. 48)), and old or aged persons (*Thompson* v. *Thompson* (1844) (1 Coll. 392); *Thompson* v. *Corby* (1860) (27 Beav. 649)), have been held to mean poor widows, orphans, children, and aged persons, and to be charitable gifts accordingly. A gift to the sons of the clergy in London appears to have been treated as charitable in *A.-G.* v. *Ward* (1797) (3 Ves. 327).

The recipients of any such charitable gift may be restricted to those of any particular religious denomination (*Collinson* v. *Pater* (1831) (2 R. & M. 344)); or to those of all denominations, except one (*Bruce* v. *The Presbytery of Deer* (1867), L. R. 1 H. L., Sc. 96)); or to persons possessing other special qualifications (*Collinson* v. *Pater* (1831) (2 R. & M. 344); *Nash* v. *Morley* (1842) (5 Beav. 177); *Reeve* v. *A.-G.* (1843) (3 Hare, 191); *Russell* v. *Kellett* (1855) (3 Sm. & Giff. 264)).

A testator making any such gift may himself appoint the

persons to administer it (*Collinson* v. *Pater* (1831) (2 R. & M. 344); *A.-G.* v. *Clegg* (1738) (Amb. 584)).

Scheme usual.

In default of trustees appointed by the donor, the administration of any such general trust will be carried out by the Court by means of a scheme (*Nash* v. *Morley* (1842) (5 Beav. 177); *Reeve* v. *A.-G.* (1843) (3 Hare, 191)); but the Court may, if it think fit, hand over the administration to an existing charitable organization (*Powell* v. *A.-G.* (1817) (3 Mer. 48)).

Poor does not mean paupers.

The rule of the Court is that gifts for the benefit of the poor will not be applied for the benefit of those receiving parochial relief, on the ground that if they were so applied they would go in ease of the poor-rates, and so benefit the rich rather than the poor (*A.-G.* v. *Price* (1744) (3 Atk. 108); *A.-G.* v. *Clarke* (1762) (Amb. 422); *Bishop of Hereford* v. *Adams* (1802) (7 Ves. 324); *A.-G.* v. *Corporation of Exeter* (1827) (2 Russ. 45); 3 Russ. 395); *A.-G.* v. *Bovill* (1840) (1 Ph. 762); *A.-G.* v. *Brandreth* (1842) (1 Y. & C. Ch. C. 200); *Re Seckford's Charity* (1861) (4 L. T. N. S. 321)). But this does not mean that paupers receiving relief will be studiously excluded from receiving any indirect benefit. Gifts to the poor may be properly applied for schools, hospitals, and other purposes, which will benefit all classes of the poor (*A.-G.* v. *Bovill* (1840) (1 Ph. 762); *Wilkinson* v. *Malin* (1832) (2 Tyr. 544)).

It appears, also, from *A.-G.* v. *Blizard* (1855) (21 Beav. 233), stated in the chapter on Parishes, that a trust in aid of the poor-rate of a parish is a good charity. See also, on this point, the argument in *Doe* d. *Hindson* v. *Kerry* (Duke, B. 495) (Highmore, 2nd ed. 506).

The Court does not favour trusts for poor (see *A.-G.* v. *Marchant* (1866) (L. R. 3 Eq. 424), stated in chapter on Charge or Trust, Chap. XXII., p. 284).

A gift to certain ascertainable individuals, one of whose qualifications is poverty, will be treated as a charitable gift, and not as a private gift (*A.-G.* v. *Goulding* (1788) (2 Bro. C. C. 428)).

Trust for inhabitants

Gifts to or for the benefit of all the inhabitants, rich as well as poor, of a limited locality, not forming a public district like

of a district.

a parish or town, are good as private gifts if they operate immediately (*Rogers* v. *Thomas* (1837) (2 Keen, 8)); but void as perpetuities, if they are perpetual trusts (*Browne* v. *King* (1885) (L. R. Ir. xvii. 448)); but gifts for the benefit of a parish are good charitable trusts, though rich as well as poor are benefited by them. See the chapter on Gifts to Parishes.

The following are cases on the subject of this chapter:—

Poor.

A.-G. v. *Ranee* (cit. 1 Amb. 422) (July, 1728). Legacy to the poor:—*Held*, a good charity, and the particular application was, as a matter of fact, directed by the Crown. It appeared that the testator was a French refugee, and the money was accordingly given to poor refugees. It will be seen from the later cases of *Nash* v. *Morley* (1842) and *Reeve* v. *A.-G.* (1843), that in a similar case in the present day the Court would administer the charity itself by means of a scheme.

Selection by executors.

A.-G. v. *Clegg* (Amb. 584) (Oct. 1738, L. C.). Testator directed various specified sums to be paid to a specified number of poor ministers, widows, maidens, boys, and the like, to be selected by his executors, and appointed three executors. Two of his executors died, without any definite selection being made, but the executors had agreed to select one-third each, and submit lists to the others for approval. One of the deceased executors had made his list and submitted it to the others, but it had not been approved:

Held, that the surviving executor should select all the recipients subject to the power of the Court to control him, if he did not discharge the trust properly. No scheme ordered.

A.-G. v. *Price* (2 Atk. 108) (1744). A charity estate produced a surplus. The Lord Chancellor said he would order it to be paid to such poor as are not maintained by the parish.

A.-G. v. *Clarke* (Amb. 422) (Nov. 1762, Sir T. Clarke, M.R.). Testator gave the interest of £4200 Bank Annuities to the poor inhabitants of St. Leonard, Shoreditch, for ever:

Held, a good charity, and not uncertain, and that the persons entitled were the poor not receiving relief.

A.-G. v. *Goulding* (2 Bro. C. C. 428) (Dec. 1788, Buller, J.).

A devise of nine houses to A. for life, and after his death as follows: "Eight to eight poor people that have paid most and longest to the poors' books in M. parish, as the books shall prove, and the corner house to repair them." The will contained a further disposition of the dividends of £800 Four per cent. Annuities, after the death of A., "to the eight houses for ever, to each house £4 every year for ever."

The gift of the houses was held void as being a charitable gift, and not a gift to designated individuals.

A.-G. v. *Ward* (3 Ves. 327) (March, 1797, M.R.) A mixed fund of real and personal estate given to pay charitable and other legacies, held void. But the report is not very clear, and it appears as if the Court was only dealing with real estate, as the heir is declared to be entitled. The legacies were to paying off a debt on a Methodist chapel, to two infirmaries, to the poor of two parishes, to the sons of the clergy in London, and to the poor of the parish of S. not receiving relief. No argument or decision appears on any of these points.

Bishop of Hereford v. *Adams* (7 Ves. 324) (July, 1802, Lord Eldon). Testator by will and codicil gave the residue of his estate to trustees to invest and apply the income of a certain part "unto and amongst such number of the poor inhabitants of the parish of S., at such times and in such proportions, and either in money, provisions, physic, or clothes, as his trustees, or the major part of them, should from time to time think fit, for the better support and maintenance of such poor inhabitants." There were similar gifts of the rest for two other parishes. The residue applicable for this bequest brought in some £2400 a year. The parishes were small; the total poor-rates being less than £300 a year. Poor.

The Lord Chancellor said that the poor inhabitants not receiving alms, *i.e.* relief, should be the objects of the trust, and approved a scheme for making payments for schooling and apprenticing children, as well as giving physic, clothes, bedding, fuel, food, and gratuities, and paying an agent. How fund applied.

Powell v. *A.-G.* (3 Mer. 48) (July, 1817, M.R. Sir W. Grant).

Widows and children of seamen.

Bequest of residue "to the widows and children of seamen belonging to the town of Liverpool":

Held, a good charity.

It appeared that there was an existing charity, of which the rectors of Liverpool were the administrators, the income of such charity being applicable unto and among such poor sailors' widows and orphans, inhabitants of Liverpool, as should in the judgment of the rectors be deserving objects of charity.

Fund handed over.

The residue was ordered to be paid to the existing rectors of Liverpool, to be invested in the names of them and their successors, the interest to be applied like the income of the existing charity.

Widows and orphans.

A.-G. v. *Comber* (2 Si. & Stu. 93) (July, 1824, Sir John Leach, V.-C.). Testator gave one-fourth of a certain fund "to the widows and orphans of the parish of Lindfield, Sussex":

Held, equivalent to the poor widows and orphans, and a good charity, the testator's motive being obviously charitable.

Poor citizens and inhabitants.

A.-G. v. *Corporation of Exeter* (2 Russ. 45, and 3 Russ. 395) (Nov. 1827, Lord Lyndhurst). In the reign of Hen. VII. lands had been given to the corporation by a grant in Latin meaning "in aid and relief of the wants of the poor citizens and inhabitants of the city, who are often grievously burdened, both by the fee farm rents of the same city payable yearly to the king and to others, and by other impositions and tallages of the said king, when he happens to make a progress through the whole kingdom of England."

It was held that this was a charity, and that the rents should be applied in relief of the poor inhabitants not receiving parish relief.

Collinson v. *Pater* (2 Russ. & My. 344) (Feb. 1831, Sir John Leach, M.R.). Testator recovered judgment against M., and after M.'s death a suit was instituted to administer his estate, and the judgment was found to be a charge on his real estate.

The testator left his residuary personal estate to his executors on trust to invest in the Government funds, and pay the dividends equally between four persons, P., H., I., and W., for their

respective lives, and when each should die to pay the share of her so dying to such other person, being the widow of a respectable tradesman who was at the time of his decease inhabiting the town of N., such widow being a member of the Established Church, as the vicar for the time being should appoint during her natural life, and so on for ever. Widows of respectable tradesmen.

It was assumed that this was a good charity:

Held, that the judgment debt was impure personalty, and could not be given on this trust.

It is not stated whether the trust of it was good or bad for the lives of the first takers, but it would seem to be good.

It would also seem that the trust in this case could only be deemed charitable on the ground that "widows" meant "poor widows" (see *A-G.* v. *Comber*).

In *Wilkinson* v. *Malin* (2 C. & J. 636) (2 Tyrw. 544) (1832), Lord Lyndhurst laid down that the building of a school-house and maintaining a school for the children of the poor were a proper application of money directed to be applied for the relief of the poor of a particular parish. School.

Rogers v. *Thomas* (2 Keen, 8) (March, 1837, Lord Langdale, M.R.). Bequest: "I give and bequeath to the inhabitants of T. Row, in the parish of S., all which may remain of my money after my lawful debts and legacies are paid." Inhabitants of row.

The Master found that T. Row consisted of seven houses, which were entirely occupied by poor fishermen and labourers and their families, and that the inhabitants at the time of the death of the testatrix were thirty persons, named in his report:

Held, that these inhabitants of T. Row took the residue of the personal estate.

This was doubtless treated as a private gift, and not a charitable bequest; and it would appear that they took as joint tenants.

A.-G. v. *Wilkinson* (1 Beav. 372) (March, 1839, Lord Langdale, M.R.). By a sort of inclosure award, made in November, 1619, it was ordered that out of a certain common there should be set out and allotted to and for the relief of the poor of the town-

ship of S. for ever, threescore acres, at the rate of 6*d.* for every acre. The rents of this land had been applied for the benefit of the poor receiving relief, but this was ordered to be discontinued, and the benefit of the charity given to poor persons not receiving parish relief.

Paupers excluded.

A.-G. v. *Bovill* (1 Ph. 762) (March, 1840, L. C.).

Certain land had been conveyed in 1552 on trust for the benefit of the poor of a certain parish. From time to time the income produced by the land had increased, and the charity had been regulated by commissioners under the Statute of Elizabeth and the Court of Chancery, but there were still accumulations and a further scheme was required. The Lord Chancellor disapproved of the rule excluding recipients of parochial relief; but approved of a scheme which provided for enlarging and endowing the parochial charity schools, for building and endowing infant schools, for establishing and endowing a commercial school, for apprenticing children, contributing to hospitals and the like, building new almshouses, and giving sums of money to persons not receiving parochial relief.

That rule disapproved and fund applied generally.

It will be seen that this scheme gave nothing directly to the poor rates, nor to the paupers, but established and aided general charities, which might indirectly benefit paupers, and relieve the poor rates.

A.-G. v. *Brandreth* (1 Y. & C. N. R. 200) (Jan. 1842, V.-C. Knight-Bruce). Bequest of £200 to the poor of O., to be settled by the executors, so that the interest might be paid to them yearly. The executor paid it to the trustees of a dispensary for the parish of O. and the adjoining parishes:

Dispensary disallowed.

Held, that this was wrong, and the executor must pay the amount again into Court, and the order directed the sum to be invested and the income to be paid to the defendant during his life and afterwards to the vicar of O. and to be laid out by him and the churchwardens yearly on Christmas Eve, in providing fuel and clothing for such of the deserving poor, resident in O., whether parishioners or not, but not receiving outdoor relief, as might be agreed upon.

Nash v. *Morley* (5 Beav. 177) (June, 1842, Lord Langdale, M.R). Testator directed part of his estate to be laid out in the funds, and continued: "And that my executors hereafter named and their heirs and assigns do receive the interest thereof half yearly and divide it among poor pious persons, male and female, old or infirm, as they see fit, not omitting large and sick families if of good character":

Held, a good charitable trust; and a scheme would be directed if desired by the Attorney-General.

Bristow v. *Bristow* (5 Beav. 289) (June, 1842, Lord Langdale). Bequest of Bank Post Bills, to be invested, "the interest to be every year given for the relief of the poor on my little estate in Suffolk." Poor on two farms.

The testatrix originally had two farms in Suffolk. They were settled on her marriage to the use that she should receive a rent-charge of £300 a year for life, and subject thereto on her husband in fee. He sold them subject to the rent-charge:

Held, a good gift for the relief of the poor on the two farms.

Reeve v. *A.-G.* (3 Hare, 191) (July, 1843, V.-C. Wigram). Bequest of £1000 in the funds "to the Society for Bettering the Condition of the Poor" in trust to pay the dividends "for house-rent in sums not above £5 each to seven or more country labourers once only on producing a certificate from the clergyman or churchwardens of their honesty, sobriety, quietness and industry and attendance at church, and their not possessing money or land or goods to above £5, nor receiving parochial relief." There was a similar bequest of £1000 to the Society for the Encouragement of Female Servants, on a somewhat similar trust for servants. Both societies refused to accept the gifts: Fantastic trust. Refused by society.

Held, that the gifts were charitable, and would be carried out by the Court by means of a scheme, and that the funds were not liable to be applied as the Crown might direct. Scheme.

Thompson v. *Thompson* (1 Coll. 392) (August, 1844, V.-C. Knight-Bruce).

A testator gave some fantastic directions respecting a weekly distribution of bread to twelve poor old persons residing in the

Old persons.

parish of D., in Scotland, and afterwards substituted sixteen old persons and added a yearly treat.

It was held that sixteen poor old persons were intended, and that the gift would be good in England, and an inquiry was directed as to Scotland, and as to the best means of carrying it into effect.

Public asylum held not entitled to a charitable legacy.

In *Lechmere* v. *Cutler* (24 L. J. N. S. Ch. 647) (July, 1855) a testator gave £1000 to the treasurer for the time being appointed or to be appointed to an institution to be called the "Worcester Lunatic Asylum," for the humane and charitable purposes of that institution, adding that in case no such asylum should be built within seven years from the death of his wife, he gave the £1000 and its interest to the Worcester Infirmary. Within the period named an asylum, called the Worcester County and City Pauper Lunatic Asylum, was built for pauper lunatics, under statutory authority, whereby the cost of it was charged on the rates.

Wood, V.-C., held that the asylum was not entitled to the legacy, observing that if he gave the legacy to the asylum the benefit would fall on the ratepayers, and that would not answer the testator's intention.

Russell v. *Kellett* (3 Sm. & Giff. 264) (Dec. 1855, V.-C. Stuart). Testatrix gave her real estate to be sold, and gave the proceeds thereof and her personal estate to her executors on trust to pay her debts, expenses, and legacies. She then gave fifty-six pecuniary legacies and continued: "To such poor widows or credible, industrious, unmarried women, upwards of forty years of age, residing in the town and hamlet of U., and in the several parishes of V., P., and D., and having no relief from those places respectively, the sum of £5 each. To poor, credible industrious persons residing in the said town and hamlet of U., A., V., P., K., O., and M., with two children or upwards, or above fifty years of age, maimed, or otherwise unable to gain a living, and whose income shall not exceed £5, I give the sum of £2 10*s.* each. To the poor people residing in the town and hamlet of U., and in the parishes of D., P., and V., the sum of £20, to be paid

and divided in such manner as my trustees think proper." The testatrix directed any overplus of her estate "to be paid and divided to and among all the said legatees in proportion to their respective legacies."

Application of immediate charitable gifts.

Held, that the legacies here set out were charitable; that they failed in the proportion of the realty and impure personalty to the pure personalty; that a share of the overplus was given to them, not as individuals but charitable purposes, under which only such of the original objects as were living at the time of the distribution of the overplus could claim a benefit in respect of the first two gifts, the poor at the time of the distribution to take a share under the third gift.

Thompson v. *Corby* (27 Beav. 649) (Feb. 1860, Sir J. Romilly, M.R.). Testatrix, after disposing of £1000 out of £1600 Consols, continued: "And I give the interest of the remaining six hundred of the aforesaid sixteen hundred pounds to be divided equally twice in the year between twenty aged widows and spinsters of the parish of Peterborough":

Aged.

Held, a good charity, on the authority of *A.-G.* v. *Comber* (2 Si. & St. 92), and *semble*, the word "aged" would create a charity.

These cases appear to negative the opinion that the word "aged" will not create a charity (see Duke, 125, cited in *A.-G.* v. *Haberdashers' Co.* (1 My. &. K. 428)).

Re Sekforde's Charity (4 L. T. (N.S.) 321) (May, 1861, V.-C. Wood).

Paupers excluded.

In settling a scheme of a charity, the Vice-Chancellor specified that no person actually receiving parochial relief should be admitted to the almshouses of the charity.

Bruce v. *The Presbytery of Deer* (L. R. 1 H. L. (Sc.) 96) (March, 1867, LL. Chelmsford, Cranworth, Westbury, and Colonsay).

Poor Protestants.

Testator said: "The whole of the balance of my property I leave to poor of this presbytery, to be divided—I mean the interest—by the sessions of the several churches, but to be paid to all Christians except Roman Catholics."

The next of kin contended this was void for uncertainty.

Held, a good charitable gift, defining the objects, the subject, and the administrators.

In *Browne* v. *King* (L. R. Ir. xvii. 448) (August, 1885) there was a trust, duly constituted according to the laws of Ireland, for the payment of the rent of certain land to such Roman Catholic clergyman as should for the time being, according to the rules of the Roman Catholic Church, be entrusted with the spiritual care and superintendence of the Roman Catholic inhabitants of the parish of R. for the purpose of having the rents applied by the said clergyman for the benefit of the children under the age of twelve years of the tenantry of M. B., the settlor, in such manner as to the said clergyman should appear most advisable.

Children of tenants on estate, not a charity.

This was held void as not being charitable. The Master of the Rolls said: "There is nothing to guide me in deciding that the gift is for children of poor persons or persons in great need. The law imposes on parents the duty of supporting their children, and there is nothing to satisfy me that the tenantry of M. B. are not able to fulfil that obligation."

We may observe that in modern times the Court has accepted the conclusion that the distribution of money to poor persons is not a desirable form of charity, and when the mode of application is in the province of the Court, it prefers some other method of benefiting the poor. See the cases of *A.-G.* v. *Marchant* (L. R. 3 Eq. 424) and *In re Campden Charities* (18 Ch. D. 310).

CHAPTER XIII.

Of Gifts for Poor Relations.

Summary of cases.

The cases on gifts to poor relations cannot all be reconciled, and if any general rules are to be deduced from them, it is necessary to regard some of them as bad law. The rules, however, which accord with the bulk of the cases will be found to be the following :—

Immediate gift.

(1.) An immediate gift to the poor relations or kindred of the testator, or of any one else, whether made directly, or entrusted to the discretion of the executors or any other person or persons, is a private gift and not a charity (*Griffith* v. *Jones* (1686) (2 Rep. in Ch. 179); *Anon.* (1716) (1 P. Wms. 327); *Goff* v. *Webb* (1602) (Tothill, 30)).

Limits of class.

(2.) Under such a gift made directly the objects are limited to the class who would take as next of kin under an intestacy of the testator or other person named, and further limited to such of these objects as are poor, unless there are expressions in the will extending the class (*Anon.* (1716) (1 P. Wms. 372); *Edge* v. *Salisbury* (1749) (Amb. 70); *Brunsden* v. *Woolredge* (1765) (Amb. 506); *Cruwys* v. *Colman* (1804) (9 Ves. 319)). But if there is only one statutory next of kin, that one takes the whole (*Widmore* v. *Woodroffe* (1766) (Amb. 636)).

(3.) If the will contains expressions extending the class, as, for instance, if the testator names A. and B. and his other poor relations, then the class includes both the statutory next of kin, and all within the same degree as A. and B.; the class being limited as the smallest which will include all the objects of the testator's bounty (*Carr* v. *Bedford* (1679) (2 Rep. in Ch. 77); *Griffith* v. *Jones* (1686) (2 Rep. in Ch. 179)); but the words

"friends and relations" mean merely relations (*Gower* v. *Mainwaring* (1750) (2 Ves. Sen. 87, 110); *Re Caplin's Will* (1865) (34 L. J. Ch. 578)).

Court will distribute.

(4.) If, under a gift for the benefit of poor relations at the discretion of some trustee or trustees, the trustees die without exercising the discretion, or decline to exercise it, the Court will exercise it and will direct an inquiry with that object (*A.-G.* v. *Doyley* (1735) (7 Ves. 58, n.); *A.-G.* v. *Bucknall* (1741) (2 Atk. 328)).

Perpetual gift.

(5.) A perpetual gift for the benefit of poor relations of the testator or any other person, is treated as a charity for the poor in general (*A.-G.* v. *Sidney Sussex College* (1869) (L. R. 4 Ch. 722); *A.-G.* v. *Duke of Northumberland* (1877) (7 Ch. D. 745)), with a preference for persons related to the testator, or the person so named, as the case may be (*Isaac* v. *Defriez* (1753) (Amb. 595); *White* v. *White* (1802) (7 Ves. 423); *Mackintosh* v. *Townsend* (1809) (16 Ves. 331); *A.-G.* v. *Price* (1810) (17 Ves. 371); *Hall* v. *A.-G.* (1829) (2 Jarm. 3rd ed. 114); *Bernal* v. *Bernal* (1838) (3 My. & Cr. 559); *Browne* v. *Whalley* (1866) (W. N. 386); *Gillam* v. *Taylor* (1873) (L. R. 16 Eq. 581)).

Powers of selection and distribution.

(6.) Under a gift for relations or kindred, whether with or without the word "poor," entrusted to the discretion of some trustee or trustees, a fine distinction is drawn as to whether an appointment may be made to a person outside of the limit of the statutory next of kin, to the effect that when the donee has a power of distribution, such an appointment is good; but when he has only a power of selection, it is not good. But it is clearly settled that only the statutory next of kin can take in default of appointment (*A.-G.* v. *Doyley* (1735) (7 Ves. 58, n.) overruled; *Gower* v. *Mainwaring* (1750) (2 Ves. Sen. 87, 110); *Cole* v. *Wade* (1806) (16 Ves. 27)), or under the decree of the Court (*Re Caplin's Will* (1865) (34 L. J. Ch. 578)).

(7.) As to what words give a power of distribution, and what give a power of selection merely, the decisions are really conflicting (*Edge* v. *Salisbury* (1749) (Amb. 70); *Brunsden* v. *Woolredge* (1765) (Amb. 506); *Mahon* v. *Savage* (1802) (1 Sch.

& Lef. 111); *Pope* v. *Whitcombe* (1810) (3 Mer. 689); *Forbes* v. *Ball* (1817) (3 Mer. 437); *Grant* v. *Lynam* (1828) (4 Russ. 292)).

Who take.

(8.) In all the aforesaid cases in which the property goes to the statutory next of kin absolutely, they take as joint tenants, and, of course, equally. The statute is held to define the persons, but not the shares in which they are to take.

(9.) When the property is given to one for life, and then to the testator's relations as the tenant for life may appoint, the persons who take in default of appointment are those who would be the statutory next of kin at the death of the tenant for life (*Finch* v. *Hollingsworth* (1855) (25 L. J. Ch. 55)).

(10.) The words "next of kin," unqualified by any reference to the Statutes of Distribution, mean next of kin according to natural degrees, reckoning one degree for each step upward and one for each step downward in the pedigree. Such next of kin also take as joint tenants unless otherwise directed. But if there is a reference to the statutes, then statutory next of kin are meant (*Withy* v. *Mangles* (1841) (4 Beav. 358) (10 Cl. & Fin. 215)).

Digest of cases.

The following is a digest, in chronological order, of the principal cases relating to this branch of our subject:—

Immediate gift.

Goff v. *Webb* (Tothill, 30) (44 Eliz. 1601–2). A testator bequeathed a sum of money to be distributed to twenty of the poorest of his kindred, and it was held good, though it did not appear that he had any poor kindred.

Carr v. *Bedford* (2 Rep. in Ch. 77) (30 Car. 2, 64) (1679). Testator gave residue of his personal estate to and amongst his kindred, according to their most need, to be distributed amongst them by his executors, saving such legacies as he should by his will or any codicil further dispose of; and afterwards, by a codicil, he gave other legacies and desired that a care and regard should be had to J. B. J. B. was a son of a sister of the testator, apparently still living:

Kindred including J. B.

Held, that brothers and sisters of the testator, and the children of brothers and sisters, were denoted by the word "kindred;"

and that the executor ought to consider those that had most need, and give to J. B. a considerable share.

N.B. This decision is based on the analogy of the Statutes of Distribution, and apparently the children of living brothers and sisters were let in because one of them was mentioned.

Griffith & Others v. *Jones* (2 Rep. in Ch. 179) (2 Jac. 2, 353) (1686), reversing Trevor, M.R. (2 Freem. 96)).

Testator gave legacies to his brother and all his nephews and nieces, and the overplus of his estate he obliged his executors should pay and distribute amongst his brothers' and sisters' children and grandchildren, and the rest of his poor kindred, according to his executors' discretions. The plaintiffs included the testator's brother and all his brothers' and sisters' children and grandchildren, and claimed that no one else could be let in under the word "kindred":

Held, that the surplus of the said estate should be distributed to and amongst the testator's brothers' and sisters' children and grandchildren; and as to the rest of the poor kindred, according to the Act of Parliament for distributing intestates' estates, and no further; and to be distributed in such shares and proportions as the executors in their discretions should think fit.

Anon. (1 P. Wms. 327) (Trinity Term, 1716, M.R.). It was said by the Master of the Rolls and admitted by Mr. Vernon and others, to be settled, that where one devises the rest of his personal estate to his realations, or to be divided among his relations, without saying what relations, it shall go among all such relations as are capable of taking within the Statutes of Distribution; else it would be uncertain; for the relations may be infinite.

Relations.

But in the principal case the testator devised the surplus of his personal estate to his poor relations; and the Countess of Winchelsea being a relation, as near as any, to the testator, she was a party to the suit and claimed a share; and it was decreed she was entitled thereto, in regard the word [poor] was frequently used as a term of endearment and compassion, rather than to signify an indigent person; as one speaking of one's

Poor relations.

father, often says, "my poor father," or of one's child, "my poor child." "Poor" word of endearment.

"But" the reporter suggests that "this seems to have been a strained interpretation in favour of the Earl and Countess of Winchelsea, who had not an estate anyways proportionable to their quality." (The above is verbatim.)

It will be seen that this interpretation of the word "poor" has not been followed.

A.-G. v. *Doyley* (7 Ves. 58, n.); *Doyley* v. *A.-G.* (4 Vin. Alr. 285) (Dec. 1735, M.R.). Testator in 1714 left his estate on trust for E. for life, and on her death and failure of her issue, which happened, then the trustees were to dispose of his real and personal estate to such of his relations of his mother's side who were most deserving, and in such manner and proportions as they should think fit, and to such charitable use as they should think most proper and convenient. One trustee refused to act. Most deserving relations.

Held, that the discretion devolved on the Court, and that one moiety of the net residue was divisible equally amongst the testator's relations on his mother's side, within the degree of third cousins, living both at death of E. and date of the decree: the other moiety to go in charity by a scheme with a preference for poor relations of the testator not sharing in the first moiety. Class when fixed.

Eventually £400 of the second moiety was given to eight poor relations, £400 to the Westminster Infirmary, other sums to other charities.

Apparently the judge considered that as there was a power, the limit of the statutory next of kin might be exceeded; but that is inconsistent with the other cases. Forty-two relations were let in.

A.-G. v. *Bucknall* (2 Atk. 328) (June, 1741, L. C. Hardwicke). A Mr. Ward gave £4600 South Sea bonds to one Biscop, who left a letter saying that it was given to him to assist Ward's poor relations.

On an information it was decreed that it was a gift of the

principal and interest for the benefit of Ward's poor relations, and an inquiry was directed as to the objects of the charity.

This is cited in Amb. 71, n. as *A.-G.* v. *Buckland,* where it is said that the Master was to certify what poor relations of Ward were living at the time of his death, and which of his relations then living had since become poor.

Edge v. *Salisbury* (Amb. 70), and *Goodinge* v. *Goodinge* (1 Ves. Sr. 230, and Belt's Supp. 128) (Apr. 1749, L. C. Hardwicke). Testator directed his executors to pay £2000 "to and amongst such of my nearest relations of the family of Edge as my executors shall think the greatest objects of charity in such manner and in such proportions as my executors and the survivors and survivor of them shall think fit; and I do hereby desire that my executors would take the advice and direction of my said sister Salisbury in the distribution thereof."

Nearest relations.

Parol evidence admitted to shew that the testator called his first cousins his relations:

Held, that only next of kin according to the statute could take; the parol evidence being insufficient to bring in first cousins, they not being amongst the nearest relations. First bill dismissed. In second suit declaration made that the fund was divisible among the testator's statutory next of kin of the family of Edge as the executors with the advice Mrs. Salisbury should determine, but Mrs. Salisbury herself was held excluded from taking any part.

NOTE.—"Nearest relations" generally excludes nephews and nieces when there are brothers and sisters, but this point was not taken in this case (Jarman, 3rd ed. ii. 110).

Gower v. *Mainwaring* (2 Ves. Sen. 87, 110) (Dec. 1750, L. C. Hardwicke). J. executed a deed by which trustees were to give the residue of his real and personal estate among his friends and relations, where they should see most necessity, and as they should think most equitable and just. He had a son, two daughters, and a wife. Two of the trustees died, and the third refused to act. One of the daughters got him to make a will giving her husband £800, apparently, which devolved on her.

Friends and relations.

The other died before judgment, and possibly before the testator, leaving a son.

It was held that the residue after paying the £800 was divisible between J.'s son and the son of J.'s deceased daughter according to their necessities and circumstances, as to which an inquiry was directed. Friends was held to mean relations.

Isaac v. *De Friez* (Amb. 595, Reg. Book A) (1753) (17 Ves. 373, n.). Testator in 1725 bequeathed to G. an annuity of £50 during her life, and after her death he gave it to his wife's poorest relations, to be distributed and paid to them and such of them proportionately share and share alike at the discretion of his executors. He gave another annuity of £10 similarly. He further gave the interest of his stock to his wife; and after her death one half year's interest to one poor relation of his own, either male or female, for a portion in the way of marriage, and putting him or her out in the world; and the other moiety in the same manner to one poor relation of his wife; the direct management thereof to be left to the discretion of his executors; and if his own and his wife's relations should be extinct, then he made a gift over: Perpetual gift.

Held, that the disposition should be established as a charity, and directions given to prepare a scheme, and inquiries directed to ascertain the poor relations of the testator and his wife.

Spencer v. *Warden of All Souls Coll., Oxford* (Feb. 1762); *Wilmot's Cases* (163). This was an appeal to the Archbishop of Canterbury as visitor of All Souls. He held, on the advice of Mr. Justice Wilmot, that the statutes of the college gave the kindred of the founder a right to the fellowships in preference to strangers in blood: such a statute being perfectly legal. Founder's kin.

Brunsden v. *Woolredge* (Amb. 506) (June, 1765, Sir T. Sewell, M.R.). Benjamin Burgess, being entitled to £500 charged upon an estate, directed by will that, after the death of his brothers W. and I. without issue, which happened, it should be equally distributed amongst his mother's poor relations. Immediate gift.

William Burgess gave personal and real estate to W. to sell, pay debts, and pay the surplus money to such of his mother's

poor relations as W., his heirs, executors and administrators for the time being should think objects of charity, and in such proportions he and they should think fit, and he made W. his executor:

Held, relations meant such as would take under the Statutes of Distribution, and the gift was "such of my mother's relations as are poor and proper objects." Inquire who are such, and divide the £500 amongst them, and let W. fix the division of the surplus of William's estate amongst them. Therefore, it was held to be a good private gift.

Sole next of kin.

Widmore v. *Woodroffe* (Amb. 636) (Dec. 1766, L. C.). Testator left one-third of his residue to be distributed amongst the most necessitous of his relations by the father and mother's side.

He left a niece his sole next of kin on both sides:

Held, that she was entitled to the whole.

Bennett v. *Honywood* (Amb. 708) (June, 1772, Lord Apsley, C.). Testator gave £20,000 to his executors on trust to distribute amongst such of his relations by consanguinity who should not appear to his executors to be worth more than £2000 a piece, and who within two years after his death should apply, or being minors be applied for; such distribution not to be restrained to any degree of his kindred.

M. applied, £47 was appointed to her; she died:

Class when fixed.

Held, her administrator was entitled to it.

H. applied and died. Her administrator's name was by consent inserted in the lists of objects.

C. was conceived, but not born at the testator's death:

Held, not entitled to be placed in the list; but it may be doubted whether this is now law.

Campbell v. *The Earl of Radnor* (1 Bro. C. C. 271) (1783, Lords Commissioners) will be found cited below on the subject of foreign charities.

Blandford v. *Thackerell* (2 Ves. Jun. 238) (July, 1793, L. C. Loughborough). Testator gave real and personal estate in trust that a commodious and proper house should be taken on lease

at such yearly rent as should be agreed on or otherwise as the trustees shall think fit as a school; and that the children and grandchildren of some relations should be placed there from the age of seven to fourteen, then to be put out apprentices; also that such other children as the trustees should think fit should be placed at the same school; and he gave directions as to an inscription and visitation: this trust is void under the Mortmain Act as to the general trust of a permanent charity, but good as to the disposition for the relations to the extent of the children and grandchildren born in proper time of such of the persons specified as were in being at the testator's death; and while the school is kept open for them other children may be educated there. Severable gift.

Mahon v. *Savage* (1 Sch. & Lef. 111) (Feb. 1802, Lord Redesdale, C.). Testator bequeathed to his executor £1000 "to be distributed amongst his poor relations or such other objects of charity as should be mentioned in his private instructions to his executors." He left no instructions. One of the next of kin was poor at the testator's death, but had become rich before the date of a decree inquiring who were the poor relations of the testator: Class when fixed.

Held, he was properly excluded.

One who was poor died in the interval:

Held, that his representatives were properly excluded on the construction of the bequest:

Held, that the executor had a power of distribution amongst the testator's poor relations and was not confined to his next of kin. Power of distribution.

White v. *White* (7 Ves. 423) (Aug. 1802, Sir W. Grant, M.R.). Testatrix by will bequeathed a personal fund of about £3000 stock for the purpose of putting out "our poor relations" apprentices. Afterwards by a codicil she confined it to two families:

Held, as follows: "Are not such cases supported as charities? There was a case of this kind, *Moeatto* v. *Lonsada*, lately before me, where a great number of Jews were the object. I may Perpetual trust.

execute it as far as I can. I do not know why those who are ready may not be put out apprentices."

The decree directed such of the objects as were ready, to be put out apprentices, and the fund to be laid out from time to time, with liberty to apply.

Cruwys v. *Colman* (9 Ves. 319) (Feb. 1804, Sir W. Grant, M.R.). Bequest to sister for life, adding, "And it is my absolute desire that my sister B., whom I have made my only executrix, bequeath at her own death to those of her own family what she has in her own power to dispose of that was mine, provided they behave well to her with decency and affection."

Family.

The sister by will left this property unbequeathed:

Held, a trust for the next of kin of B.

Cole v. *Wade* (16 Ves. 27) (Aug. 1806, M.R.). Gift of residue of real and personal estate to such of testator's relations and kindred in such proportions, manner, and form as his executors should think proper; recommending and advising them to give the greatest share and proportion thereof unto such person and persons who in their opinion and judgment should appear to them to be his nearest relations and the most deserving.

Nearest relations.

The executors died without exercising their power:

Held, that it is now settled, that whatever latitude might be taken by a party having a discretionary power, the Court executing such a trust is confined to the next of kin within the Statute of Distributions.

It was further held on appeal in this case, reported by the name of *Walter* v. *Maunde* (19 Ves. 423) (July, 1815, L. C.), that the next of kin took the testator's real estate as real or personal, according to the state it was in at the death of the surviving executor; and the costs were apportioned according to the values of the real and personal estate.

Mackintosh v. *Townsend* (16 Ves. 331) (June, 1809, L. C. Eldon). A gift of £10,000, to be invested and the income applied in Scotland for the education of boys to be selected from the descendants of certain families, was assumed to be a good charity.

Perpetual trust.

Pope v. *Whitcombe* (3 Mer. 689) (July, 1810, Sir W. Grant, M.R.). Testator gave the residue of his estate to his wife for life, and after her death, in the events which happened, he gave some legacies, and directed her to dispose of the residue amongst his relations in such manner as she should think fit. Power of selection.

The wife appointed to some persons who were related to the testator, but not of his next of kin:

Held, that the appointment was bad, and that the fund went to the person who would have been the next of kin of the testator at the time of his wife's death.

NOTE.—The report of this case in Merivale is inaccurate, but the correct decree is mentioned in *Finch* v. *Hollingsworth* (25 L. J. Ch. 55), and is set out in Sugden on Powers (Appx. 8th ed. p. 953).

A.-G. v. *Price* (17 Ves. 371) (Nov. 1810, Sir W. Grant, M.R.). Testator, in 1581, devised land to his wife for 40 years if she should so long live, and after her death to E. J. and his heirs, adding, "And also that he, the said E. J., shall at what time soever the possession of the same premises shall fall and come to him by virtue of this my will, that yearly from thenceforth he, the said E. J., and his heirs shall for ever divide and distribute, according to his and their discretion, amongst my poor kinsmen and kinswomen, and amongst their offspring and issue which shall dwell within the county of Brecon, the sum of £20 by the year, without fraud and collusion." Perpetual trust for kinsmen.

The will proceeded to direct that E. J. and his heirs should pay out of the same land every year for ever, to the use of the poor of the parish of St. George, Southwark, £5 4*s.* quarterly, with directions for the distribution:

Held, as follows:—"This seems to me to be in the nature of a charitable bequest, particularly upon the case of *Isaac* v. *De Friez* (Amb. 595), which is both imperfectly and erroneously reported. This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance in favour of a particular description of poor; and is not like an

immediate bequest of a sum to be distributed among poor relations." (Observe the date of the will.)

Walters v. *Maunde* (19 Ves. 423) (July 8, 1815, L. C.). See *Cole* v. *Wade* (*suprà*).

Forbes v. *Ball* (3 Mer. 437) (Aug. 1817, Sir W. Grant, M.R.). Will: "I give to my wife A. the sum of £500; and it is my will and desire that my said wife may dispose of the same amongst her relations as she by will may think proper." The wife was the sole executrix. She, by will, left £500 to her sister and P. on trust to pay the dividends to her sister for life, and divide the principal after the sister's death among the sister's children equally.

Relations.

Distribution allowed.

This was held to be a good appointment, but it was not argued that the sister's children were not objects of the power.

Grant v. *Lynam* (4 Russ. 292) (March, 1828, Sir J. Leach, M.R.). Testator gave a house to his wife for life, with power for her to give it on her death "to any one of my own family she may think proper."

Family.

She gave it by will to one related to him, but not of his next of kin:

Held, good, apparently on the ground that a donee of such a power might always go beyond the limit of the statutory next of kin.

Distribution.

Hall v. *A.-G.* (2 Jarm. 114, 3rd ed.) (July, 1829, M.R.). In a subsequent case, Sir J. Leach, M.R., held that a devise of real estates to trustees, "in trust to pay the rents to such of my poor relations as my trustees shall think most deserving," was a charitable trust, and consequently was void as a gift of an interest in land.

Devise.

Bernal v. *Bernal* (3 My. & Cr. 559) (Feb. 1838, L. C. Cottenham). The testator, a Jew, who died at Amsterdam, and was held to have had his domicil there, made a will in Spanish, whereby he gave personalty in England to be accumulated, and according to a questionable translation which was admitted to probate, he proceeded: "Except that it should happen to appear to my executors that any of the relations hereinafter named

should be reduced to want, in which case all the dividends or interest shall be applied to those in necessity which are" (five men and three women) "if they or their children shall come to want, and in like manner the male children of the above-named men, also included in this clause: Leah, Rachel, and Esther, of Jacob Bernal, my brother, and their children, whom God prosper, that they may not come to want."

This was treated as a charity for the males of the families mentioned, and eventually a question arose whether male descendants of males alone were entitled, or male descendants of females also, when all claimed through the five men above mentioned. And it was

Held, that male descendants of males alone were entitled.

The Master reported that all the claimants professed Judaism, and were poor.

Liley v. *Hay* (1 Hare, 580) (June, 1842, V.-C. Wigram). Testator devised real estate to the vicar and churchwardens of K. and their successors, and certain other trustees, their heirs and assigns, upon trust to receive the rents, and make thereout certain annual payments, and to "apply the remainder, if any, in manner and form following: that is to say, on every 1st of December or St. Thomas's Day, to distribute amongst certain families according to their circumstances, as in the opinion of the said trustees they may need such assistance, whose names are hereinafter mentioned, viz." (he then named twenty-four persons): Devise.

Held, a good beneficial devise during the lives of the persons mentioned at any rate, and, *semble,* good altogether as a trust for such of them as the trustees should appoint, and in default equally in fee. Severable gift.

Only *Baker* v. *Sutton* (1 Keen, 224); *Leake* v. *Robinson* (2 Mer. 389); *Ibbetson* v. *Ibbetson* (10 Sim. 515); *Wright* v. *Atkyns* (17 Ves. 261); *Brown* v. *Higgs* (8 Ves. 573); and *Bankes* v. *Le Despencer* (10 Sim. 589), cited.

It appears to be impossible to reconcile this decision with the bulk of the authorities.

Finch v. *Hollingsworth* (25 L. J. Ch. 55) (July, 1855, Romilly, M.R.). Testator gave the residue of his estate to his wife for life, and after her death he directed that one moiety should be conveyed and delivered over to his own relations in such parts, shares, and proportions as his wife in and by her last will and testament in writing, or any codicil thereto, should order, direct, or appoint.

Future disposition.

He left two brothers, his next of kin, who both died before his widow. She by will directed the moiety to be divided in certain shares among the next of kin of the testator living at her death:

Held, a good appointment. The report of *Pope* v. *Whitcombe* (3 Mer. 689) corrected.

Re Caplin's Will (34 L. J. Ch. 578) (Apr. 1865, V.-C. Kindersley). Bequest on trust for wife for life and then "to such and so many of the relations or friends of his said wife as she should by will appoint." The wife made a will containing a residuary bequest, but not referring to this power:

Relations or friends.

Held, a special power and not exercised by a residuary bequest; and that there was a trust in default of appointment for the wife's statutory next of kin.

Note, in *Gower* v. *Mainwaring* (2 Ves. Sen. 87, 110), "friends and relations" was held to mean no more than "relations" (see above).

Browne v. *Whalley* (W. N. 1866, 386) (Dec., Romilly, M.R.). Testator died in 1723, bequeathing £70 per annum for ever, to be distributed among his relations who might happen to be in want or fall into decay. A scheme was settled some forty years afterwards, and in 1760 the £70 was ordered to be paid equally between three persons. As each recipient died, his or her nearest relatives presented a petition asking to stand in the place of the deceased, and such orders had been made without serving the petition on anybody. Two annuitants had lately died, and a petition was presented by seven infant children and one adult child of one of them and the sole grandchild of the other, supported by evidence of their poverty.

Application of small fund.

The Attorney-General suggested some inquiry as to who were the most proper objects of the charity.

The Master of the Rolls thought the expense of an inquiry too great to incur in such a case, as not likely to produce any corresponding benefit, and said it was best to continue to give the fund to the relatives of the last takers. He therefore granted the petition, excluding, however, the adult petitioner as being able to earn his own living.

A.-G. v. *Sidney Sussex College* (L. R. 4 Ch. 722) (March, 1869, L. C. Hatherley). Testator in 1641 gave land to Sidney Sussex College, and Trinity College, Oxford, "for the only use, education in piety, and learning of four of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife, or in default of such to their next poor kindred for the first by the father's side, for the second by the mother's side." Devise to college.

The colleges required persons claiming the benefit of this gift to become members of them respectively, and if no claimants appeared they carried the amounts to their general funds:

Held, a proper application.

Gillam v. *Taylor* (L. R. 16 Eq. 581) (June, 1873, V.-C. Wickens). Testator gave the residue of his real and personal estate to trustees in trust to be invested in Government securities in their joint names, the interest of which shall from time to time be given to such of the lineal descendants of Richard Wilson, my dearest mother's brother, as they may severally need, and the said trustees of this fund shall make such provision as will ensure a continuance of the said trust at their decease: Perpetual trust.

Held, a charitable trust, and therefore void as to the realty and impure personalty, but good as to the pure personalty, and a scheme ordered to be drawn up.

A.-G. v. *Duke of Northumberland* (7 Ch. D. 745) (Dec. 1877, Sir G. Jessel, M.R.). Testator before Georgian Mortmain Act said: "I give and devise for the relief and use of the poorest of my kindred such as are not able to work for their living vide- Poorest of kindred.

licet, sick, aged, and impotent persons, and such as cannot maintain their own charge the sum of £1000, which said sum of £1000 my will and meaning is shall be laid forth and bestowed in the purchase of lands of inheritance of the value of three score pounds per annum at the least, and the rents and profits thereof to be paid yearly unto them and to be distributed amongst them by my said executors and their heirs, and by the Lord Mayor of London and the sheriffs for the time being as most need shall be from time to time, and my will and meaning is that in the bestowing and distributing of my estate and goods to the poor charitable uses which is according to my intent and desire those of my kindred which are poor, aged, impotent, or any other way unable to help themselves shall be chiefly preferred and respected."

The income of the estate increased very much, and more than 700 persons claimed to be founder's kin, many being well and rich :

Held, a charitable trust for the poor, with a preference for the testator's poor kindred. Poorest must mean very poor. A trust for the poorest of several wealthy people is not a charity.

CHAPTER XIV.

On Gifts for Schools, Learning and Humanitarian Purposes.

Schools.

Schools of learning.

Gifts for the foundation or maintenance of schools are good charitable gifts, whether the school is intended to be a free school or a school for the education of sons of gentlemen: *A.-G.* v. *Earl of Lonsdale* (1827) (1 Sim. 105). Some of the earlier cases on this subject cannot be regarded as law now. Thus in *A.-G.* v. *Hewer* (1700) (2 Vern. 387) relief was refused on the ground that a school, which was not a free school, was not a charity. And in *Porter's Case* (1592) (1 Co. Rep. 16) a devise was made on condition that the devisee should assure the lands to the use of a school, and the devisee having failed to do so, the testator's heir at law was held entitled to recover the land. The word "condition" in such a context would now be held to create a trust, which might be enforced by the Attorney-General if the property were such as could be legally devoted to a charitable purpose. (See the chapter on miscellaneous points.)

In *A.-G.* v. *Lord Lonsdale* (1 Sim. 105) (Jan. 25, 1827, V.-C. Leach) the judge said: "The institution of a school for the sons of gentlemen is not, in popular language, a charity; but, in the view of the Statute of Elizabeth, all schools for learning are so to be considered; and on that ground no objection can be made to the trusts of the deed of 1697."

Learning.

Gifts for the promotion of learning have been held to be charitable gifts, even when the subject encouraged was one not

Theoretical knowledge.

directly bearing any fruits of practical utility. Thus in the cases about to be stated, (1) the British Museum, (2) prizes for essays on learned subjects, (3) chartered societies for promoting special subjects, and (4) existing professorships in universities and the establishment of new professorships of archæology and economic fish culture, have been held to be charitable objects.

In the case of *The Trustees of the British Museum* v. *White* (2 Si. & Stu. 594) (July, 1826, V.-C. Leach) the British Museum was held to be a charity, because it was established for public purposes. This case will be found more fully stated in the chapter on special exemptions from the Georgian Mortmain Act.

Thompson v. *Thompson* (1 Coll. 381) (Aug. 6, 1844, V.-C. Knight Bruce).

Bequest to Scotch trustees, with trusts declared of the income, one being—

"A sum not exceeding £40 a year is to be given in money or medals for the best essays in statistics, politics, or Government, criticism and moral philosophy, etc., with reference to the doctrines maintained in my writings on those subjects."

A further testamentary paper mentioned that the prizes were to be confined to Edinburgh in the first instance:

Held, valid according to the law of England, and an inquiry directed as to Scotland.

Beaumont v. *Oliveira* (L. R. 6 Eq. 534) (July 20, 1868, V.-C. Stuart, affirmed (4 Ch. 309) Jan. 21, 1869, L.JJ. Selwyn and Giffard).

Testator gave to the treasurer for the time being of the Royal Society the sum of £4000, and similar legacies to the Royal Geographical Society, the Royal Humane Society, the Marylebone School for Girls, and the Albert Orphan Asylum.

The Royal Geographical Society was incorporated with the object defined to be "the improvement and diffusion of geographical knowledge."

The Royal Society was incorporated "for improving natural knowledge":

Held, that the purpose of both was the advancement of objects of general public utility, and they were therefore both charities.

The other institutions were also held to be charities, the contrary not being seriously argued.

Yates v. *University College, London* (L. R. 8 Ch. 454) (L.-C. Selborne and L. J. Mellish, March 17, 1873, affirmed in H. L. Feb. 16, 1875 (L. R. 7 H. L. 438)).

A bequest of pure personalty to University College, London, on trust to pay the annual income thereof to the Professor of Mineralogy and Geology for the time being of that college as an endowment of the said professorship; treated as good.

Also a bequest of pure personalty to the same college to found a new Professorship of Archæology, held good.

A.-G. v. *Green* (1789) (2 Bro. C. C. 492) is an authority on the validity of a gift for establishing travelling fellowships, and buying advowsons for a college at Oxford.

In *A.-G.* v. *Margaret and Regius Professors in Cambridge* (1682) (1 Ver. 54) a devise of £50 a year for a lecturer in polemical or casuistical divinity, was treated as a good charitable gift.

The Royal Society of London was regarded as a charitable institution in *Royal Society of London and Thompson* (1881) (17 Ch. D. 407).

In *A.-G.* v. *Hartley* (1793) (4 Bro. C. C. 412) a gift for the maintenance and education of boys at Christchurch Hospital, in the study of mathematics, was held good.

In *A.-G.* v. *Marchant* (1866) (L. R. 3 Eq. 424), a gift of £16 per annum to add books to the library of Trinity College, Oxford, and £4 per annum to repair and adorn the library, were recognised as good charitable dispositions.

In *Buckland* v. *Bennett* ('Law Journal Notes,' 1887, p. 7) (Chitty, J., Jan. 1887), a bequest for founding a professorship of economic fish culture was held a charitable bequest.

On the other hand, in *Thompson* v. *Shakespeare* (Johns. 612; on app. 1 De G. F. & J. 399) (Jan. 1860), a bequest for

founding a museum at Shakespeare's house was held to be a private purpose and not a charity. But this was because the spot indicated was private property, and it was a trust to create a perpetual institution on private property, which could not be carried out. The case will be found more fully stated in the chapter on Gifts to Religious Orders and Private Societies.

Harmonic Society.

But a Sacred Harmonic Society established for the practice of choral singing and performance of oratorios and similar works, and supported by the subscriptions of the members and receipts from the concerts, is not a charity (*In re Allsop's estate, Gell* v. *Carver* (W. N. 1884, 196) (Nov. 1884, Chitty, J.)).

Trusts for animals.

It would seem on principle that gifts, of which the sole object is to benefit animals, would be void, being neither for the private benefit of anybody, nor the public benefit of everybody. Thus a case is referred to in *A.-G.* v. *Whorwood* (1 Ves. Sen. 536) in which a bequest to feed sparrows was held void. Nevertheless we find a case in which a trust for the sole benefit of horses was carried out. This was

Mitford v. *Reynolds* (1 Phil. 185) (1841–2, L. C. Lyndhurst) (S. C. 16 Sim. 105) (1848, V.-C. Shadwell). Testator disposed as follows:—"Ninthly, I will, devise, give, and bequeath the remainder of my property, of whatsoever kind and description, and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners and never under any plea or pretence to be used, rode, or driven or applied to labour), to the Government of Bengal," &c., upon a certain charitable trust.

The validity of the disposition as to the horses was not disputed, and the ultimate order directing the proceeds of the estate to be paid to the Governor-General of India, also made provision for the maintenance of the horses, with liberty to the Governor-General to apply in respect thereof from time to time as the horses died (16 Sim. 120).

If this gift had been contested, it is difficult to see how it

could have been upheld, except as an authority to the executors to apply the horses and the requisite amount of money in the manner indicated.

Trusts for useful animals and flowers.

However, gifts to benefit man through the medium of benefiting animals are good charities, and so are gifts to benefit man by improving the cultivation of vegetables; and it seems that animals kept for amusement stand in the same position, in this respect, as animals kept for food or use, and flowers designed for ornament in the same position as vegetables and fruits and timber trees. We think that these results are borne out by the two following cases :—

Townley v. *Bedwell* (6 Ves. 194) (July, 1801, L. C.). Testator, after reciting that he trusted it would be a public benefit, devised his freehold botanic garden at Stockwell, and all his real and personal estate, subject only to certain charges, to seven trustees with power to sell the same, upon trust to preserve for ever his botanic garden at Stockwell, or some other garden to be formed under his will to be called "Stockwell Botanic Garden, founded by Benjamin Robertson, Esq."; the garden to be kept up, improved, and extended in as ample a manner as the income of his estate would admit; and the plants to be moved on any change of the garden to a new site. Will dated September 1, 1800:

Held, void, on the ground that the testator said that he trusted it would be a public benefit. That is to say, his motive was charitable, and he intended the garden to be so managed as to benefit the public. The devise was therefore void under the Georgian Mortmain Act.

University of London v. *Yarrow* (1 De G. & J. 72) (April, 1857, Cranworth, C., and Knight-Bruce and Turner, L.JJ., affirming Romilly, M.R., Nov. 1856) (23 Beav. 159). Bequest of pure personalty to the governors of the University of London "for the founding, establishing, and upholding an institution for investigating, studying, and, without charge, beyond immediate expenses, endeavouring to cure maladies, distempers, and injuries any quadrupeds or birds useful to man may be found

subject to," within a mile of either Westminster, Southwark, or Dublin, as might by the Chancellor, &c., of the university be thought most expedient:

Held, that the object was a good charity, and that the gift was good as to Dublin in any case, as the Georgian Mortmain Act does not extend to Ireland; and, *quære*, whether it necessarily implied the acquisition of land.

The Lord Chancellor added: "And as to animals which are ordinarily kept for amusement, that an establishment which could be effectual to cure diseases among them would be a good charity, is a matter upon which I entertain no doubt whatever; nor do I entertain a doubt that it would be a good charity to establish an institution for investigating and removing the causes of the potato disease and of the vine disease, for it would tend to the improvement of those vegetables; and if any sound theory were to arise from its investigations it would be a most beneficial establishment for mankind in general."

We ought in this connection also to refer to the case of *Tatham* v. *Drummond* (L. J. 34 Ch. 1), where a gift to the Society for the Prevention of Cruelty to Animals, to establish slaughter-houses remote from dwelling-houses, and to protect the animals from cruelty, was considered to be a charitable gift. And a similar opinion was expressed in *Marsh* v. *Means* (3 Jur. N. S. 790) (1857), where a gift was made to an association having a similar object, to aid the publication of a periodical; but the gift failed owing to the collapse of the association.

In *Obert* v. *Barrow* (35 Ch. D. 472) (May, 1887, C. A.), the opinion was expressed that a home for lost dogs was a charitable institution, and that a society for the protection of animals liable to vivisection was a society with a charitable object.

Before leaving this branch of our subject we ought to state the case of *A.-G.* v. *Whorwood* itself. We think the result of it is as follows:—(1) A gift to a corporation established for the promotion of learning to form part of its corporate property and to be applied accordingly is good. (2) A gift to such a corporation as trustees for some specified charitable purpose or pur-

poses is also good. But (3) a gift to such a corporation upon a special trust for the perpetual benefit of some member or members of it is void as a perpetuity. The two first rules here laid down are of course subject to the provisions of the Plantagenet and Georgian Mortmain Acts, so far as the same apply. The case then is as follows:—

Fantastic trust annexed to gift to college.

A.-G. v. *Whorwood* and *Whorwood* v. *University College* (discussed 1 Ves. Sen. 534) (Aug. 1750, decision of Lord Keeper Henley, stated in note to *Corbyn* v. *French*, 4 Ves. 434). Testator devised the remainder of his real and personal estate to University College, Oxford; and by a codicil annexed particular regulations, that is to say, that if there be a senior fellow of the college, who must be a divine of the age of forty, in all respects of good repute, he shall be the possessor of all his estate and furniture of his house at Denton to keep it in repair; not to fell timber without the consent of the college; to live in his house hospitably; and sometimes give entertainment to the poor; to distribute cordials and drugs to them, when needful; to give to them some books and pamphlets of good morals and piety; and to give an annual entertainment to the fellows; if he prove dissolute, then the election to be void, and another proceeded to.

An inquiry directed, whether the college had power to take in mortmain, and whether these regulations were consistent with the college statutes: per Lord Hardwicke. Apparently one or both of these inquiries were answered in the negative; and eventually the next of kin filed a supplemental bill, and we are told (4 Ves. 434) that Lord Keeper Henley held that the disposition of the personal estate, so far as it was intended for a charitable purpose, was void; and under that decree the next of kin obtained a transfer of all the funds. The will and codicil were apparently prior to the Georgian Mortmain Act.

Trusts for dinners and suppers.

We may here mention that in *A.-G.* v. *Barham* (1835) (4 L. J. N. S. Ch. 128), a perpetual trust for giving a dinner to the householders and married people of a town, and a supper to the young people, was apparently treated as charitable, but these trusts

seem to have escaped observation amongst other really charitable trusts.

To this we may add, that gifts for the support or establishment of hospitals are charitable gifts. We shall see, in the chapter on Special Exemptions from the Georgian Mortmain Act, that the legislature has granted to many hospitals the right to acquire a considerable amount of land by devise.

Lifeboat.

Also a gift to establish a lifeboat has been held to be a charity (*Johnston* v. *Swann*) (1818) (3 Mad. 457).

And so has a gift to the Royal National Lifeboat Institution (*Lewis* v. *Boetefeur*) (W. N. 1878, 21; 1879, 11), and a gift to them on condition of their making and keeping in repair two tubular lifeboats, of a pattern named, to be stationed at D. and P. (*In re Richardson, Shuldham* v. *Royal National Lifeboat Institution*) (1887) (35 W. R. 710).

And a gift to assist emigrants in emigrating, and to provide comforts for them during the voyage (*Barclay* v. *Maskelyne* (1858) (4 Jur. N. S. 1294)).

CHAPTER XV.

On Directions to publish Books, and Political Gifts.

Directions to publish.

We may well discuss here the effect of a direction by a testator that certain manuscripts should be published, or that a certain sum of money should be laid out in such a publication. It would seem to be necessary first of all to consider whether the contents of the manuscripts were such that their publication would be a charitable act—that is to say, a benefit to the public. If it were so, the trust would be charitable, and would be enforceable at the instance of the Attorney-General. But, if the intended publication could not be considered charitable, the trust would appear to stand upon the same ground as a trust to erect a monument to a testator. It might operate as an authority to the executor to lay out so much money in that way if he thought fit; and, if the executor failed to exercise such authority, it could only operate as a direction to the residuary legatee, or other person taking the property, respecting the mode in which he should enjoy it: and all such directions are void (compare *A.-G.* v. *Haberdashers' Co.* (1 My. & K. 420) and *A.-G.* v. *Catts Hall* (Jac. 381)).

Even in the case of a charitable work, difficulties might occur in carrying out the direction, unless the testator clearly specified the mode of disposing of the printed copies, and the destination of any return of money brought in by them.

Some light is thrown on the legal effect of directions to publish manuscripts by the case of *Thompson* v. *Thompson* (1 Coll. 381) (Aug. 6, 1844, V.-C. Knight-Bruce), which is stated in the chapter on Indefinite Gifts, where there was a perpetual gift of the residue of a moiety of the income of the

testator's estate, as follows :—"The remainder of the said half, if any, shall be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works."

The provision made by the testator respecting the produce of his manuscript works, devoted a portion of them to the benefit of members of his family. The trustees named by the testator declined to act. It was held that this gift failed altogether, and the property comprised in it was undisposed of.

In *Marsh* v. *Means* (3 Jur. N. S. 790) (1857) a testator left a sum of money to an association to aid a periodical of which the object was charitable. The gift failed because both periodical and association expired before the testator; but the Vice-Chancellor (Wood) considered that, if they had continued, the bequest would have been a good charitable gift.

In *Thornton* v. *Howe* (1862) (31 Beav. 14), a trust for the publication of the works of Joanna Southcote was considered to be a charity. And

In *De Themmines* v. *De Bonneval* (1828) (5 Russ. 288), a trust to publish a book was held void on account of the political nature of its contents. These two cases will be found stated in the chapter on Religious Cases.

In *Tyrrell* v. *Whinfield* (W. N. 1877, 99) a testator gave to trustees a manuscript work called 'The Ethics of the Future,' and the copyright thereof on trust to publish it, or by publication and compiling to disseminate the chief views expressed in it, and he gave them £2000 to be employed for that purpose at their discretion. The report merely states that it was held that no legacy duty was payable on the £2000; but the Crown is not stated to have been represented, so that the decision must have been that the legacy duty was payable out of the residue.

On Political Gifts.

It is a common practice for a number of individuals amongst us to form an association for the purpose of promoting some change in the law, and it is worth our while to consider the

effect of a gift to such an association. It is clear that such an association is not of a charitable nature. However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed. Each Court on deciding on the validity of a gift must decide on the principle that the law is right as it stands. On the other hand, such a gift could not be held void for illegality. It is the right of any number of citizens to promote by constitutional means any change in the law which they may think fit. A gift, therefore, to such a political association is a private gift to the members of it, to be applied in furthering the objects of the association—a mode of application which they themselves have decided to be beneficial to them. Law Amendment Societies.

Next let us consider the effect of a gift for the purpose of advocating a change in the law, when no association exists for that purpose. Such a gift would not be a charity, for the reasons above mentioned; and it would not be a gift for the benefit of any individuals, for there is nothing to define the recipients of it. It would seem to follow, therefore, that such a gift was void altogether. We think that this result is established by the following case:— Altering the law.

Habershon v. *Vardon* (4 De G. & Sm. 467) (May 30, 1851, V.-C. Knight-Bruce). Testator directed that £1000 out of his pure personalty should be paid "towards the political restoration of the Jews to Jerusalem and to their own land."

Counsel for the Attorney-General asked that the fund might be applied *cy-près* if the purpose could not accurately be fulfilled, but the Vice-Chancellor held that the gift was not a charitable legacy, and was void, adding: "If it could be understood to mean anything, it was to create a revolution in a friendly country. Jews might at present reside in Jerusalem; and, if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte."

We may observe that there was nothing in the terms of the bequest to indicate that the testator contemplated unconstitu-

tional measures for effecting his object. The case, therefore, is an authority on all gifts for promoting alterations in the constitution of foreign countries, whatever means may be employed for effecting such alterations; and we submit that the same principle would apply to gifts for promoting alterations in our own laws, at least when such gifts are not framed as gifts to existing associations.

On this point we may again refer to *De Themmines* v. *De Bonneval* (1828) (5 Russ. 288), where a trust to publish a political book, chiefly affecting France, was held void.

And we may also refer to *Obert* v. *Barrow* (35 Ch. D. 472) (May, 1887, C. A.), where it is tolerably clear that the judges thought that a society for the total suppression of vivisection was not a charity.

Enforcing the law.

A voluntary association for the enforcement of the law upon any point evidently stands upon a different footing from an association for the purpose of altering the law. It must be regarded as the intention of the legislature that the laws should be enforced. Such an association, therefore, appears to have a public, *i.e.* charitable object, and that whether it seeks to accomplish its object by legal means or moral means, or both. In *Tatham* v. *Drummond* (L. J. 34 Ch. 1) a gift to the Society for the Prevention of Cruelty to Animals, for the establishment of slaughter-houses remote from dwellings, and protection of the animals from cruelty, was considered to be a charitable gift.

And in *Marsh* v. *Means* (3 Jur. N. S. 790) (1857) a gift to an association having a similar object, to aid the publication of a periodical, was considered to be charitable, but it failed owing to the collapse of the association.

Relief of prisoners.

Closely connected with the subject of gifts to promote alterations in law come gifts for the relief of persons suffering penalties for breaking the law as it now stands. Such gifts are void upon every principle. But we must distinguish gifts for relief of criminals from gifts for the relief of debtors. The latter have merely broken their private contracts, and gifts for their relief are really gifts to enable them to fulfil their broken contracts.

The fines inflicted for the breach of the general laws are of a different nature, being intended as a punishment on the guilty parties. If the validity of a gift to satisfy such fines were allowed, it would be a direct encouragement to break the law. The principal case on this subject is—

Thrupp v. *Collett* (No. 1) (26 Beav. 125) (July, 1858, Romilly, M.R.).

Testator bequeathed £5000 to his executors, adding "which I direct they will, within the period of five years from my decease, pay and apply in purchasing and procuring the discharges of persons who, at the time of my decease, or at any time during the said period of five years, shall or may be committed to prison for non-payment of fines, fees or expenses, under the game laws now or to be hereafter in force." He added that no payment for any one person should exceed 19 guineas: and, if the trust was held unlawful, he gave the £5000 to his wife and daughter. The wife and daughter claimed the money.

Poachers.

The Master of the Rolls said: "I cannot support this bequest. It is impossible not to see that the effect of it would be to give immunity and protect persons in the commission of acts which are treated by the legislature as offences, and for which penalties by fines are imposed. . . . This is against public policy."

Penalties.

The widow and daughter were evidently held entitled to the money.

An old dictum upon this point has been preserved. In Duke, B. 131, we read: "A gift was made to relieve such as were imprisoned for their conscience' sake. It was agreed in *Throgmorton and Gray's Case* (41 Eliz.) (1599) that if they were in prison in subjection to the law upon condemnation, they were relievable; if upon obstinacy, not to be relieved by the charity of this law."

But the former branch of this dictum seems to be inconsistent with *Thrupp* v. *Collett*.

The validity of gifts for the release of debtors from prison has been recognised as a good charitable gift in many cases:—

Debtors.

In re Prison Charities (L. R. 16 Eq. 129); *A.-G.* v. *Hankey* (L. R. 16 Eq. 140, n.; *Mercers' Company* v. *A.-G.* (2 Bligh, N. S.

165); *A.-G.* v. *Fishmongers' Company, Knesworth's Will* (5 M. & Cr. 11); *Mayor of Lyons* v. *Advocate-General of Bengal* (1 App. Cas. 91); *A.-G.* v. *Painter Stainers' Company* (2 Cox, Eq. 51).

In 1670, an Act of Parliament (22 & 23 Car. 2, c. 20) was passed containing a clause (s. 11) appointing commissioners to look after trusts of this nature.

On the abolition of imprisonment for debt, the funds devoted to this purpose have been diverted to other analogous purposes. In *A.-G.* v. *Hankey* (L. R. 16 Eq. 140, n.) a scheme was sanctioned directing money to be applied annually "towards discharging out of prison so many poor prisoners as should then be in any jail or house of correction in England or Wales, or in aiding their families, or in aiding prisoners discharged from any jail or house of correction in England and Wales to get back to their families or to procure work," with power for the trustees to avail themselves of the assistance of the Prisoners' Aid Society.

But the scheme in this case appears to have been sanctioned with very little consideration, and it is probable that, if the attention of the Court had been called to the point, it would have framed the scheme so as not to offend the principle of *Thrupp* v. *Collett.*

CHAPTER XVI.

On Indefinite Gifts.

(1) *On Fiduciary Powers.*

General power.

In general a testator may leave his property to whomsoever he pleases, or he may give to any person a power of disposal over all or any part of his property. In the latter case the donee of the power may exercise it in his own favour, and the gift is almost equivalent to an absolute gift to the donee. Should the donee die merely giving all his property to some one, this general gift operates by statute (Wills Act, 1837, s. 27) as an exercise of the power. Should the donee, however, die without exercising the power, the property devolves (1) as the testator may have directed in default of appointment by the donee of the power, and (2), if no direction has been given, it goes as undisposed-of property of the testator, *i.e.* to his next of kin or heir-at-law, in general.

Conferred on two or more, effect of.

A testator in like manner may confer on two or more persons a power of disposing of his property, and he may confer the power only on the whole set named by him, or extend it to the survivors or survivor of them, and, if he think fit, to the personal representatives of the survivor. He may also give the power to persons by name, or by a description, such as his own executors. When a power is given to two or more, however, very slight expressions in the testator's will are considered sufficient to shew that the power is not exerciseable for the benefit of the donees themselves, but that they are trustees of it, and can only exercise it for some purpose intended by the testator. If the testator, then, has not made his purpose clear,

but has left it indefinite and vague, the power and trust are void for uncertainty, and the property goes to the testator's representatives. If, however, the testator has clearly shewn that he intends the property to be applied for some charitable purpose or other, the gift is not void for uncertainty; but it is good, as to pure personalty, and void under the Georgian Mortmain Act, as to other property. The question may then arise, who is to settle the exact application of the money, and what charitable purpose is to be selected? To answer this question, we must first inquire whether the testator has named any person or persons to discharge this duty. If he has done so, his nominees have the right of determining the application of the property, subject only to the control of the Court to ensure that they shall act in good faith. If they fail to appoint, the property does not devolve on the testator's representatives, but the trust will be executed by the Court or the Crown, that is to say—in default of persons nominated by the testator, the Court considers whether the testator has indicated the objects of his bounty in express words or by any implication to be found in other parts of his will. If he has done so, the Court will administer the fund, and settle a scheme, if necessary, for that purpose. If no such direction is to be found in the testator's will, the Crown has the right of devoting the fund to such charitable purpose as it may think fit. (See the chapter on Crown Rights by Sign Manual.)

In applying the principles enunciated above, we must remember that there is a rule of law that precatory words, such as "I recommend," are construed as imperative, whenever the property to which they relate is certain, and the objects pointed out are certain, and the benefits to be conferred on those objects are certain.

Let us now come to the application of our principles, and consider first some cases in which a power given by a testator to two or more persons has been held to be a simple power exerciseable for their own benefit, or a power exerciseable only for some purpose contemplated by the testator, and consequently

a trust, valid or invalid, according to the principles above laid down. On this point we will cite first of all the case of—

General power.

Gibbs v. *Rumsey* (2 V. & B. 294) (Dec. 1813, M.R.). A specific charitable gift followed by a gift of residue of personalty and proceeds of realty to executors "to be disposed of unto such person and persons and in such manner and from and in such sum and sums of money as they in their discretion shall think proper and expedient":

Held, a general power of appointment exerciseable by the executors for their own benefit, if they thought fit.

Gibbs v. *Rumsey* has been doubted in the later case of *Buckle* v. *Bristow* (1864, cited below), but it may probably be regarded as sound law. The technical word "trust" was not to be found in it, and it may be taken that the presence or absence of that word would settle on which side of the line a doubtful case should fall. The fact that the word "trust" will vitiate an otherwise unqualified power is shewn by the following case:—

Trust.

Fowler v. *Garlike* (1 Russ. & My. 232) (Feb. 1830, Sir J. Leach, M.R.). Testatrix gave the rest of her property to G. and B. "upon trust to dispose of the same at such times and in such manner and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion." She appointed G. and B. her executors.

The Master of the Rolls was of opinion that this was a plain trust, but too uncertain for a Court to execute, and declared the next of kin entitled to the residuary estate.

The next case on this subject in chronological order is—

Special power.

Down v. *Worrall* (1 M. & K. 561) (May, 1833, Sir J. Leach, M.R.). Testator gave his residue to trustees, their executors, administrators, and assigns on trust for such purposes as he should by codicil appoint, and in default he said: "I leave it to my said trustees to settle such part thereof, either to or for charitable or pious purposes at their discretion, or otherwise for the separate benefit of my sister, independent of her husband, and all or any of her children in such manner as my said

trustees shall think fit, and so that my said brother-in-law shall have no interest whatsoever therein."

The testator made no further appointment. His trustees settled some money on the testator's sister and her children, and some for charitable purposes. Some money remained at the death of the survivor of the trustees named in the will:

Held, that the money remaining unappointed went to the testator's next of kin, the discretion being personal to the trustees named in the will.

This case is distinguished in the following case of *Salusbury* v. *Denton*. The two cases illustrate the difference between a power and a trust. Under a power to appoint to charity, any unappointed property devolves on the testator's representatives, as is the case with other powers. Under a trust to apply money in charity, any unapplied money will be administered by the Court.

Power in nature of trust.

Salusbury v. *Denton* (3 K. & J. 529) (July, 1857, V.-C. Wood). Testator gave a moiety of a sum of pure personalty "to be at the disposal by her will of my dear wife therewith to apply a part to the foundation of a charity school or such other charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe herself, and the remainder of the said moiety to be at her disposal among my relatives in such proportions as she may be pleased to direct." The widow died without having made any disposition:

Held, (1) that the widow was fixed with a trust; (2) that the trust to found a school was bad for mortizing, but the alternative of an endowment was good, and would be carried out by the Court; (3) that a scheme should be settled; (4) that one half the fund would be applied for this purpose, on the principle that equality is equity; and (5) that the next of kin of the testator took the other moiety, though, *semble*, the widow might have appointed to other relatives.

Thomson v. *Shakespeare* (1859) (Johns. 612; on app. 1860; 1 De G. F. & Jo. 399), stated in the chapter on Religious Orders and Private Societies, included a decision that a trust for "such other purpose as my said trustees in their discretion shall think

fit and desirable for the purpose of giving effect to my wishes," was void for indefiniteness.

We next come to the case of *Buckle* v. *Bristow*, in which *Gibbs* v. *Rumsey* (*suprà*) was doubted, but the two cases may stand beside each other.

Buckle v. *Bristow* (13 W. R. 68; 11 Jur. N. S. 1095) (Nov. 1864, V.-C. Wood). Testator bequeathed "all and every his property, estate, and effects to his trustees and executors upon trust" to convert the same, and he thereout gave several charitable legacies, and gave the residue "upon trust for my executors to hold the same for such uses and purposes as I may by codicil or deed direct or appoint, and in default thereof then for the same to be expended and appropriated within three years after my decease in such way and manner and for such purposes as they or the majority of them may in their judgment and discretion agree upon." Trust.

By a codicil dated the same day he gave £5000 a piece to three of his executors, £2000 to another, and £1000 to another, free of duty, adding: "And I also give such five legacies irrespective of any interest they my said executors may ultimately take in the residue of my estate." He then devised a freehold estate to one executor, and added "in all other respects I ratify and confirm my said will":

Held, that the residue was given on an indefinite trust, and therefore passed to the heir-at-law and next of kin respectively.

The presence of a number of charitable gifts in the same will will not impress a charitable intention on a general indefinite trust, even though the trust is expressed to be either to increase the testator's gifts or apply the money otherwise. This is shewn by

Harris v. *Du Pasquier* (20 W. R. 668) (May, 1872, V.-C. Wickens). Testator directed that the charitable legacies given by his will should be paid out of his pure personal estate, and continued: "And on the death or marriage of my wife which shall first happen I direct my trustees to pay the following legacies free of duty:—To the Cancer Hospital, £100; to the Brompton Hospital for Diseases of the Chest, £100; to the Right Honour- Power not restricted to charities.

able the Lord Mayor of Dublin for the time being, £100, for such objects as he shall deem most deserving; to the Blind Asylum, New Kent Road, London, £100; to Mrs. Gladstone, of No. 11, Carlton House Terrace, to be applied as she thinks proper in charity, £200, to be considered as coming to her from her correspondent 'Nemo'; and the residue I bequeath to my trustees for such objects as they consider deserving, whether in increase of the before-mentioned ones or otherwise":

Held, that the gifts to the Mayor of Dublin and the residuary gifts failed.

However, a gift to such charitable institutions as the testator should by codicil appoint, and in default to be distributed by his executors at their discretion, has been held to mean that the property should be distributed by the executors amongst charitable institutions at their discretion: a good charitable trust in fact. This was decided in—

Pocock v. *A.-G.* (3 Ch. D. 342) (July, 1876, V.-C. Hall, affirmed by James and Mellish, L.JJ.). A testator by will appointed that a fund over which he had a general power should, unless otherwise specifically disposed of by a codicil, form part of his residuary estate, which was also to be held on such trusts as he should by any codicil appoint. By a codicil he gave certain charitable legacies out of the appointed fund, and as to the residue of it he said: "I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion." He then disposed of his general residuary estate by the same codicil, and died without making any further codicil:

Power restricted to charities.

Held, that the ultimate trust in the codicil was that the residue of the appointed fund should be distributed by the executors amongst charitable institutions at their discretion.

After consideration of these cases it will be seen that the ultimate trust in *Doe* d. *Toone* v. *Copestake* (6 East, 328), stated in the chapter on Gifts to Ministers, would be void for uncertainty as well as remoteness.

CHAPTER XVII.

On Indefinite Gifts.

(2) *On Public and Private Charity.*

Let us next consider what expressions are sufficient to shew a charitable intention on the part of the testator. This branch of our subject exemplifies in a curious manner the theoretical maxim that charity is favoured by the law, and the practical fact that the disinheriting of relatives is looked upon with disfavour by many learned administrators of the law.

Requisites for charitable gift.

It has been held that, in order to devote property to charity, a testator must either direct it to be applied in charity, using the word, or for some definite purpose, which is regarded by the law as charitable, or for some general purpose which is regarded by the law as charitable, or adopt two or more of these courses. Furthermore it has been held that a direction in the alternative to apply property for some charitable purpose or purposes or some other purpose which may include matters not objects of charity, is not a good charitable gift. Thus it has been decided in several cases that a gift for charitable or benevolent purposes is void for vagueness. We shall see hereafter that decisions under the Georgian Mortmain Act have been more favourable to charities, and gifts for purposes which may involve the acquisition of land or purposes which may not, have been held good for the latter purposes.

Private charity.

The cases on the main point under consideration have even gone the length of holding that the expression "private charity" is one which may include non-charitable objects, and consequently does not raise a good charitable gift; and it seems, conversely, that all charities are deemed to be public charities. The

following are the authorities on the meaning of the expressions "public charities" and "private charity."

A.-G. v. *Peirce* (Barnadiston, 208; 2 Atk. 87) (Dec. 1740, Lord Hardwicke). Mrs. S. by will gave some legacies to her servants, and to one R. B. £10 per annum for life. She also gave legacies to the charity schools of the Greycoat boys, of the Bluecoat boys, and of the Greencoat boys, in Westminster. She gave another legacy to the Hospital for Incurables there. She gave £1000 to poor housekeepers, to be distributed to such of them and in such a manner as Mrs. N. and Mrs. G. should appoint. She gave to the parish of M. £200, and £200 to the parish of S., to be distributed amongst those that were at that time lame or visited with sickness; and she likewise gave a legacy to Bethlehem Hospital. She appointed Mrs. N. to be her executrix. Mrs. N. afterwards died leaving a will saying, "I give to all the public charities to which dear Mrs. S. has given any legacies by her will £100 a piece."

Public charities.

The residuary legatees of Mrs. N. contended that her executors ought not to pay £100 to the poor housekeepers or the parish of S.

The Lord Chancellor, according to the report in Barnadiston, said that £100 a piece ought to be paid to each of them, adding: "It has been said that by the words *public charities* Mrs. N. intended to distinguish some of the charitable uses mentioned in the will of Mrs. S. from others of them. But it is a difficult thing to support a distinction of this kind. The intent of inserting the word *public* seems to have been to declare that Mrs. N. did not mean to augment the private legacies which Mrs. S. had given by way of charity to particular persons. . . . It has been objected that some of the charities are of perpetual continuance; and thence it is insinuated as if the word 'public' could properly be applied to those charities only; but it is observable that there are other charities, which are of as general a nature as those, and therefore may equally be called public. The charities fixed on, as not public, are those to the poor housekeepers, and the poor of S. With respect to the first, it has

been said that one of the persons who had the power of distributing that charity is dead. But that can make no difference. And as to the charity of S. it may as properly be called a public charity as that to the parish of M."

And according to the report in 2 Atk. 87, the Lord Chancellor said: "I am of opinion that the word 'public' was meant only by way of description of the nature of them, and not by way of distinguishing one charity from another, for it would be almost impossible to say which are public and which are private in their nature. The charter of the Crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one. A devise to the poor of a parish is a public charity. Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them they may very properly be called public charities. A sum to be disposed of by A. B. and his executors at their discretion, among poor housekeepers, is of this kind."

Rex v. *St. Matthew, Bethnal Green* (Burr. S. C. 574) (Feb. 1767, Lord Mansfield and others). One point in this case was whether an indenture of apprenticeship required to be stamped under the Act 8 Ann. c. 9, s. 39, which exempted cases of apprentices placed out at the charge of any parish or any public charity. The apprentice had been placed out by the trustees of a voluntary yearly contribution of inhabitants of W. for the purpose of putting out boys and girls apprentices who had been brought up at the charity school of W. The fund was managed by four trustees and a treasurer.

It was held that this was a public charity. Lord Mansfield said that it was not necessary that the charity should be permanent. The reason for mentioning public charities in the Act was that a private charity might be calculated to evade the Act.

R. v. *Clifton upon Dunsmore* (Burr. S. C. 697) (Feb. 1772).

Testatrix, who had landed property at Clifton, bequeathed by her will "to Clifton £50 to be given as my brother thinks fit; some on't to put out children apprentices."

The brother applied some of this money in putting out children apprentices, and it was held that this bequest created a public charity, and that the indentures were exempt from stamp duty under the above-mentioned Act of 8 Ann. c. 9, s. 39.

Clark v. *Foundling Hospital* (Highmore on Mortmain, 552). E., by will in February, 1800, bequeathed legacies to several charities, some of which were public establishments, and others to the poor of several parishes at B., and to distressed housekeepers not receiving alms. And, after other bequests, she ordered her executors to dispose of the residue of her personal estate to and amongst the public charities which she had thereinbefore particularly named, equally to be divided between them. She died in August following, at which time one of the charitable institutions (the Magdalen Hospital, Bristol) had ceased to exist.

It was held that the legacy to the last-mentioned hospital lapsed: and that the testatrix must have intended to divide her residue amongst such of the other named public charitable institutions as had been established and were already open to receive the contributions of the public, previously to the making of her will. This went to the exclusion of poor housekeepers at the discretion of her executors; debtors in prison; and overseers of three parishes; all of whom had been named in her list of legacies.

Presumed intention of testatrix.

The Court appears to have directed an inquiry as to which were public charities, but the statement of the case and the author's own arguments on the subject are mixed up together and cannot be altogether distinguished.

Waldo v. *Caley* (16 Ves. Jun. 206) (Dec. 1808, Sir W. Grant, M.R.; on May 31, 1809, L. C. Eldon refused to impound the fund pending an appeal, and the appeal was then abandoned). Testator gave all his personal estate to trustees, upon trust to pay the income to his wife for life, adding, "I do direct and

desire that she will, with the advice and assistance of my said trustees, or the survivor of them, yearly and every year during her life, lay out and expend one moiety or half part of the net income of my personal estate in promoting charitable purposes, as well those of a public as of a private nature, and more especially in relieving such distressed persons either the widows or children of poor clergymen or otherwise as my said wife shall judge most worthy and deserving objects, giving a preference always to poor relations": Charitable purposes of private nature.

Held, that the moiety was distributable by the widow without power for the trustees to do more than advise her, which advice she might follow or not as she pleased; that it was unnecessary to direct a scheme, and that the fund should be ordered to be paid to the widow, reserving to any of the parties liberty to apply, as there should be occasion; so that, if at any time there should be ground for supposing that the fund had not been fairly expended, the Court might be called on to interfere.

Lord Cottenham, in *Ellis* v. *Selby* (7 Sim. 352) (*infrà*), considered *Waldo* v. *Caley* to be qualified by the later case of *Ommanney* v. *Butcher* (1 Turn. & Russ. 260) (*infrà*).

Johnston v. *Swann* (3 Mad. 457) (Dec. 1818, V.-C. Leach). Testator gave and bequeathed all the residue of his personal estate and effects to his executors, and the survivors and survivor of them, and his executors and administrators, upon trust to pay and apply the same within two years next after his decease for the benefit of such public or private charities as they in their discretion might think fit, and amongst other things to establish a lifeboat for the use of the town of Brighton if they should think fit to establish the same, but not otherwise: Public or private charities.

Held, a valid charitable donation.

Lord Cottenham, in *Ellis* v. *Selby* (*infrà*), treats this case as being no longer law, being overruled in fact by the following case, namely:—

Ommanney v. *Butcher* (1 Turn. & Russ. 260) (July, 1823, Sir T. Plumer, M.R.). Testator directed certain property to be sold and certain small payments to be made, and added: "In case

Private charity.

there is any money remaining, I should wish it to be given in private charity" :

Held, that the next of kin were entitled to the money which remained.

The Master of the Rolls said that the law was settled thus: "Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the king by the sign manual; where the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust." "It appears to me that this case falls within the principle of the cases cited in which there is no object sufficiently definite to give the Crown jurisdiction, or to enable the Court to execute the trust. There is no case in which private charity has been made the subject of disposal in the Crown, or been acted upon by this Court. The charities recognised by this Court are public in their nature; they are such as the Court can see to the execution of." "Private charity is in its nature indefinite; how can it be controlled, how can it be carried into execution?"

In *Hall* v. *Derby Sanitary Authority* (16 Q. B. D. 163) (Nov. 1885) an orphanage for children of deceased railway servants was held to be a public charity.

But a trust to distribute money in charity to private individuals has been held to be good.

Charity to private individuals.

Horde v. *The Earl of Suffolk* (2 My. & K. 59) (Aug. 1833, Sir J. Leach, M.R.). Testatrix directed her executors to pay to C. A. Horde "the sum of £180 annually during the term of her natural life to be by her distributed in charity according to her own discretion and judgment either to private individuals or public institutions in such sum or sums way and manner as she shall from time to time choose without limitation or control from any person whomsoever." The testatrix then desired her executor to transfer the residue of her property to three other ladies, "to be by them, the said ladies and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor and his, her, or their personal representative or

representatives for ever, continued at interest and the dividends, interest, and proceeds thereof from time to time arising given away in charity either to individual persons or to public institutions in such sums, way, and manner as according to their own discretion and judgment they shall think fit, without the interference or control of or from any person whatever." Eventually the annuity was to fall into the residue:

Held, that the distribution of the several charitable bequests under the will was left to the absolute discretion of the several legatees, and no scheme should be directed, leaving to any party liberty to apply as there might be occasion.

CHAPTER XVIII.

On Indefinite Gifts.

(3) *On General Words and Alternative Gifts.*

What indefinite words raise a charitable trust.

We will next proceed to the cases on general words, from which it will appear that the following words standing alone raise a good charitable trust:—

Charity: *A.-G.* v. *Berryman* (1755) (1 Dick. 168).

Charitable: *A.-G.* v. *Herrick* (1772) (2 Amb. 712).

Pious uses: Ibid.

Charity, recommending a special class of objects: *Moggridge* v. *Thackwell* (1803) (7 Ves. 36).

Charity: *Legge* v. *Asgill* (1823) (1 T. & R. 265, n.).

Charities, societies, and institutions: *Obert* v. *Barrow* (1887) (35 Ch. D. 472).

The service of my Lord and Master, and I trust Redeemer: *Powerscourt* v. *Powerscourt* (1824) (1 Molloy, 616).

Religious and charitable institutions and purposes in England: *Baker* v. *Sutton* (1836) (Keen, 224).

Such pious purposes and uses as should appear to A. to be most conducive to the honour and glory of God and the salvation of the testator's soul: *Felan* v. *Russell* (1842) (4 Ir. Eq. 701), *sed quære.*

Purposes having regard to the glory of God in the spiritual welfare of His creatures: *Townsend* v. *Carus* (1844) (3 Hare, 257).

Any religious institution or purposes: *Wilkinson* v. *Lindgren* (1870) (L. R. 5 Ch. 570).

Charitable institutions, or charitable or religious subscrip-

tions purely voluntary and spontaneous: *In re Sinclair's Trusts* (1884) (L. R. Ir. xiii. 150).

Knowledge: *President of the U. S.* v. *Drummond* (1838) (cit. 7 H. L. 155).

Learning in seminaries: *Curtis* v. *Hutton* (1808) (14 Ves. 537).

Education and learning: *Whicker* v. *Hume* (1858) (7 H. L. Ca. 124).

Benefit and advantage of Great Britain: *Nightingale* v. *Goulbourn* (1848) (2 Phillips, 594).

Spread of the gospel: *Lea* v. *Cooke* (1887) (34 Ch. D. 528).

Charitable and deserving: *Stone* v. *A.-G.* (1885) (28 Ch. D. 464).

What words are void.

While the following words and expressions render the trust void for indefiniteness:—

The interests of virtue and religion and the happiness of mankind: *Brown* v. *Yeall* (before 1791) (10 Ves. 27).

Charity such as masses: *Boyle* v. *Boyle* (1877) (I. R. 11 Eq. 433).

Benevolence and liberality: *Morice* v. *Bishop of Durham* (1805) (10 Ves. 521).

Benevolent purposes: *James* v. *Allen* (1817) (3 Mer. 17).

Missionary purposes: *Scott* v. *Brownrigg* (1881) (L. R. Ir. ix. 246).

Charitable or public: *Vezey* v. *Jamson* (1822) (1 Si. & Stu. 69).

Hospitality or charity: *Mayor of Gateshead* v. *Hudspeth* (1883) (49 L. T. 587).

Benevolent, charitable, and religious: *Williams* v. *Kershaw* (1835) (1 Keen, 227).

Charitable or other purposes: *Ellis* v. *Selby* (1836) (1 My. & Cr. 286).

A specific charitable purpose or a private one for ever; *e.g.* deserving literary men or expenses of publishing manuscript works written by the testator: *Thompson* v. *Thompson* (1844) (1 Coll. 381).

Specific charitable purposes, or encouraging undertakings of general utility: *Kendall* v. *Granger* (1842) (5 Beav. 300).

Sick poor or any other utilitarian purposes: *Re Woodgate* (1886) (30 S. J. 517).

Charitable or benevolent: *Leavers* v. *Clayton* (1878) (8 Ch. D. 584) and *Phillips* v. *Robinson* (1881) (W. N. 173).

True religion in general and the comfort of the servants of God in particular: *Budget* v. *Hulford* (1873) (W. N. 175).

We shall give in other chapters cases shewing that a gift for public purposes at a specified place is a good charity, and that a general charitable intention may be inferred from a recital in a will.

Digest of cases.

The following are the cases mentioned in the two lists given above, including also the case of *Jemmitt* v. *Verrill*, which is now overruled.

A.-G. v. *Berryman* (1 Dick. 168) (June, 1755, Lord Hardwicke). A. by will gave £500 to be paid in twelve months after his death to be disposed in charity at the discretion of B. B. never exercised this discretion, but by his will directed, in case he should not receive the £500, his brother should, and dispose of it at his discretion, and appointed his wife executrix; and she proved his will. The executors of A. were advised they could not safely pay over the £500 to any one, and the question was raised in this suit:

Charity.

Held, that as B. had not exercised his discretion, the distribution of the money rested with the Crown. The Crown accordingly made an appointment to two trustees to be disposed of for certain charitable purposes; and the money was ordered to be paid accordingly. But this case is overruled by *Moggridge* v. *Thackwell* so far as it decides that the Crown could appoint; the Court would now apply such a fund.

A.-G. v. *Herrick* (2 Amb. 712) (1772, L. C.). Testator, by will dated August 10, 1732, devised realty and personalty to H. on certain trusts directing the ultimate residue to be paid and applied to charitable and pious uses:

Pious uses.

Held, a good charitable gift, to be applied as the Crown might direct.

Browne v. *Yeall* (will set out in 7 Ves. 50 (n.), decision stated in 10 Ves. 27) (July, 1791, Lord Thurlow). Testator directed the dividends of certain pure personal estate to "be from time to time for ever applied in the purchasing of such books as, by a proper disposition of them under the following directions, may have a tendency to promote the interests of virtue and religion Virtue. and the happiness of mankind; the same to be disposed of in Happiness Great Britain or in any other part of the British dominions: this charitable design to be executed by and under the direction or superintendency of such persons and under such rules and regulations as by any decree or order of the High Court of Chancery shall from time to time be directed in that behalf":

Held, that the testator, not having given to the Court more of specific direction as to the nature of the books to be purchased and circulated than that they were to be such as might have a tendency to promote the interests of virtue and religion and the happiness of mankind, had not given direction enough; and that the next of kin were therefore entitled.

Moggridge v. *Thackwell* (3 Bro. C. C. 517; 1 Ves. Jun. 464) (1792, L. C. Thurlow). Testatrix gave the residue of her personal estate to V., desiring him to dispose of the same in such charities as he should think fit, recommending poor clergymen who have large families and good characters. V. died before the testatrix:

Held, a good charitable trust, and referred to the Master to settle a scheme for its execution.

S. C. reheard (7 Ves. 36) (May, 1803, Lord Eldon). Decree affirmed.

Semble, where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but, where the execution is to be by a trustee, with general or some objects pointed out, there the Court will take the administration of the trust.

Moriee v. *The Bishop of Durham* (9 Ves. 398) (March, 1804, Sir W. Grant, M.R.), affirmed on appeal (10 Ves. 521) (March, 1805, Lord Eldon). Testatrix gave her personal estate to the Bishop of Durham upon trust to pay her debts and legacies and

Benevolence and liberality.

to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion should most approve of, and she appointed the bishop her sole executor:

Held, that the residue was given on trust, that the trust was not a charitable one, as the words would include many things which were not charities; that it was then too vague to be carried out; and the next-of-kin were consequently entitled.

Both the arguments and judgments in this case are very elaborate. It goes on the principle that, to constitute a charity, you must either have a definite object of charity pointed out, or a clear general direction devoting the property to purposes of charity.

Curtis v. *Hutton* (14 Ves. 537) (March, 1808, Sir W. Grant, M.R.). The only point decided in this case was that land in England could not be given by will for a charitable purpose out of England. Counsel for the widow and next of kin admitted the validity of the gifts of the personal estate, which was as follows:—

Foreign charities.

Gift by will of residue of realty and personalty for such uses as testator should appoint by codicil and direction by codicil to apply the income in an establishment for students in the King's College of Old Aberdeen in a further payment not exceeding £80 per annum to the general use of the college, and any surplus that might arise to be employed by the trustees at their discretion for the promoting of learning in any of the seminaries of Great Britain or Ireland.

Learning.

The validity of this gift was approved by the House of Lords in *Whicker* v. *Hume*.

James v. *Allen* (3 Mer. 17) (June, 1817, Sir W. Grant, M.R.). Testator gave the residue of his personalty to his executors "in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on":

Benevolent.

Held, not a good charity; and therefore void for uncertainty, and the next of kin entitled.

Vezey v. *Jamson* (1 Si. & Stu. 69) (Nov. 1822, V.-C. Leach).

Testator gave the residue of his estate to his executors upon trust, in default of any codicil, which happened, to pay and apply the same in or towards such charitable or public purposes as the laws of the land would admit of or to any person or persons, and in such shares and proportions, sort, manner and form so as his executors or the survivor of them or the executors or administrators of such survivor should in their or his discretion, will and pleasure think fit, or as they should think would have been agreeable to him, the said testator, if living, and as the laws of the land did not prohibit but admit of: Charitable or public.

Held, that this was a trust of which the purposes were so general and undefined that they could not be executed by the Court, but failed altogether, and the next of kin were entitled to the property.

Legge v. *Asgill* (1 Turn. & Russ. 265, n.) (July, 1823, L.-C. Eldon). Testatrix by codicil said: "If there is money left unemployed, I desire it may be given in charity." There was money left unemployed according to the construction put upon those words by the Court: Unemployed money.

Held, it was well given in charity.

Powerscourt v. *Powerscourt* (1 Molloy, 616) (Nov. 1824, Lord Manners (Ireland)). Testator devised land to trustees on trust to lay out at their discretion £2000 per annum till his son came of age, "in the service of my Lord and Master, and, I trust, Redeemer." The son was very young at the testator's death: Service of Lord.

Held, a good charity, to be applied by the trustees at their discretion, and no scheme necessary.

Obs.—The Georgian Mortmain Act does not extend to Ireland.

Jemmitt v. *Verrill* (Amb. 585, n. 4) (Dec. 2, 1826, Sir J. Leach). Bequest for such charitable and benevolent purposes as A. should think proper. Ordered to be applied as A. should point out by a scheme to be laid before and settled by the Master. Benevolent.

Obs.—Lord Cottenham in *Ellis* v. *Selby* (*infrà*) treats *Jemmitt* v. *Verrill* as being no longer law.

Williams v. *Kershaw* (stated in 1 Keen, 227) (July, 1835, Pepys, M.R., afterwards L. C. Cottenham). Testator gave the surplus and ultimate residue of his personal estate to trustees upon trust to invest the same in the public funds or on real securities, and to apply the dividends, interest, and annual produce to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, and to or for no other purposes whatsoever:

Benevolent.

Held, that this was too indefinite a trust to be capable of being carried into execution by the Court.

Ellis v. *Selby* (7 Sim. 352) (March, 1835, V.-C. Shadwell; affirmed 1 My. & Cr. 286; Feb. 1836, L. C. Cottenham). Testator stated that his will was that his trustees should pay an annuity to F. B. out of the dividends of his funded property, adding, "and subject to such annuity that my said trustees do pay and apply the whole of my said funded property, both stock and dividends due or to become due thereon, to and for such charitable or other purposes as they my said trustees and the survivors or survivor of them, his executors or administrators, shall think fit without being accountable to any person or persons whomsoever for such their disposition thereof:"

Charitable or other purposes.

Held, that this was void for uncertainty, as a devise of an estate to A. or B., and that the property passed to the residuary legatee. The discretion was not so large as to relieve the gift from being a trust, but too indefinite to be carried into effect.

The L. C. treated *Johnston* v. *Swann* (3 Madd. 457; Amb. 585, n.) and *Jemmitt* v. *Verrill* also (Amb. 585, n.) as no longer law; and regarded *Waldo* v. *Caley* as qualified by *Ommanney* v. *Butcher*, which decided that a private charity could not be carried into effect by the Court.

Baker v. *Sutton* (1 Keen, 224) (May, 1836, Lord Langdale, M.R.). Testator gave the residue of his personal estate to his executors in trust for such sundry religious and charitable institutions or other purposes as he might thereafter specify in any codicil or codicils to that his will, and in failure to do so in

trust that they and the survivors, and the executors, and administrators of such survivors should pay and dispose of the same for such religious and charitable institutions and purposes within the kingdom of England as in the opinion of the major part of them should be deemed fit and proper. Religious and charitable.

He made a codicil only giving a private legacy:

Held, that the residue was well given in charity. All debts, legacies, expenses, and costs paid rateably out of pure and impure, and a scheme directed as to the pure at the cost of the pure.

The President of the United States v. *Drummond* (M. R., May, 1838) (cit. and approved 7 H. L. 141, 155). A gift to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men, was sustained, on the ground that knowledge must mean sound and useful knowledge, and anything for the benefit, advancement and propagation of that was for the advantage of mankind. Knowledge.

Felan v. *Russell* (4 Ir. Eq. 701) (June, 1842). Testatrix bequeathed the residue of her personal estate to W. R. to "be by him applied for such pious purposes and uses as should appear to him to be most conducive to the honor and glory of God and the salvation of my soul": Pious purposes.

Held, a good charitable bequest, but the reason for the judgment is not given in the report. W. R. consented to the remembrancer making a scheme for the application of the residue to charitable purposes, and died before a scheme was confirmed:

Held, that the disposition of the fund belonged to the Crown.

It will be seen that in *Heath* v. *Chapman* (2 Drew. 417) a bequest for certain superstitious purposes and other pious uses was held wholly void. The decision that the Crown could appoint is also inconsistent with the rule laid down in *Moggridge* v. *Thackwell*.

Kendall v. *Granger* (5 Beav. 300) (July, 1842, Lord Langdale, M.R.). Testator directed the ultimate residue of the proceeds of his estate to be applied by his trustees "for the relief of domestic

Utility.

distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility." The testator left realty and pure personalty, and the heir and next of kin claimed the residue:

Held, that the trust of the residue was void on the ground that the last branch of it was vague and capable of including purposes which were not charitable.

Townsend v. *Carus* (3 Hare, 257) (Jan. 1844, V.-C. Wigram).

Words meaning religious purposes.

Bequest of residue to A. and B. "upon trust to pay, divide or dispose thereof unto or for the benefit or advancement of such societies, subscriptions or purposes having regard to the glory of God in the spiritual welfare of His creatures as they shall in their discretion see fit, and I entreat them to undertake the office of almoners of my residue and to permit me to nominate them to be executors of this my will."

Held, a good charitable bequest, applicable for such religious purposes as are regarded by the law as being charitable purposes.

Thompson v. *Thompson* (1 Coll. 381) (Aug. 1844, V.-C. Knight Bruce).

Charity or private perpetuity.

Perpetual gift of the residue of a moiety of the income of testator's estate as follows:—

"The remainder of the said half, if any, shall be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works."

The provision made by the testator respecting the produce of his manuscript works devoted a portion of them to the benefit of the members of his family. The trustees named by the testator declined to act.

Held, that this gift failed altogether, and the property comprised in it was undisposed of.

Nightingale v. *Goulbourn* (5 Hare, 484) (April, 1847, V.-C. Wigram; on app. 2 Phillips, 594; Jan. 1848, L. C. Cottenham).

Residuary bequest "To the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to

the benefit and advantage of my beloved country Great Britain": Great Britain.

Held, a good charitable bequest.

This case may be contrasted with *Newland* v. *A.-G.* (3 Mer. 684) (July, 1809), where a bequest of stock was made "to His Majesty's Government in exoneration of the national debt;" and Lord Eldon directed it to be transferred to such person as the king under his sign manual should appoint. This case will be found commented on in the chapter on Crown Rights. National debt.

Whicker v. *Hume* (14 Beav. 509) (April, 1851, Sir J. Romilly, M.R.; on app. 1 De G. M. & G. 506; March, 1852, L.JJ. Knight Bruce and Cranworth; and 7 H. L. Cas. 124; July, 1858, LL. Chelmsford, Cranworth, and Wensleydale).

Gift of residue to trustees "upon trust to apply and appropriate the same in such manner as they, my said trustees or trustee, shall in their absolute and uncontrolled discretion think proper and expedient for the benefit and advancement and propagation of education and learning in every part of the world as far as circumstances will permit": Education and learning.

Held, a good charitable bequest.

Wilkinson v. *Lindgren* (L. R. 5 Ch. 570) (June, 1870, L. C. Hatherley, affirming Lord Romilly, M.R.).

Testatrix gave legacies to several charitable institutions, and as to her residuary personal estate she said, "The trustees to pay and divide the same to and amongst the different institutions or to any other religious institution or purposes as they, the said F. and W., may think proper, which disposition I leave to their discretion": Religious.

Held, that this was a good charitable trust and not void for uncertainty.

Budget v. *Hulford* (W. N. 1873, 175) (July, V.-C. Wickens).

Bequest of some charitable legacies followed by a gift of residue "to be disposed of by my executors in the manner they judge most effectual to promote true religion in the world in general, and the comfort of the servants of God in particular, something after the manner I have made use of in this will." Comfort of God's servants.

Held, void, though the first clause standing above might have been good, and the next of kin held entitled.

Boyle v. *Boyle* (I. R. 11 Eq. 433) (June, 1877, V.-C. Court).

Masses.

Gift of residue to executors with a direction "to take a discretionary sum to pay them for their trouble, and to apply the residue to works of charity, such as masses for the eternal repose of my soul and whatever else they may judge most charitable." The testator died within three months after the date of his will leaving chattels real and pure personalty:

Held, that the gift failed because not restricted to charitable purposes. The Vice-Chancellor also expressed an opinion that a gift for masses was for a purpose which failed as to land under the Irish Act 7 & 8 Vict. c. 97, on the death of the testator within three months.

Leavers v. *Clayton* (8 Ch. D. 584) (April, 1878, V.-C. Hall).

Benevolent.

Testator, after giving numerous charitable and pecuniary legacies, directed that his executors should apply to any charitable or benevolent purpose they might agree upon, and at any time the residue of his personal property, which by law might be applied to charitable purposes. The executors, three months after his death, agreed in writing that the residue should be paid to a charitable institution to which the testator had given a legacy.

Held, that the direction to the executors was void as being indefinite, and the next of kin were entitled to the residue.

In re Riland's Estate, Phillips v. *Robinson* (W. N. 1881, 173) (Dec. 1881, V.-C. Hall).

Benevolent.

Testatrix gave certain residuary moneys to trustees, to be applied by them or the survivor "in aid of the funds of such charitable institutions, or for such charitable or benevolent objects and purposes as they or he may in their or his own discretion think proper":

Held, that the case came within the decision in *Leavers* v. *Clayton* (8 Ch. D. 584), and that the gift for charitable or benevolent objects and purposes failed.

Scott v. *Brownrigg* (L. R. Ir. ix. 246) (July, 1881, M.R., Ireland).

A testator gave the residue of his estate to B. and S., adding "upon and for certain trusts and purposes which I have fully explained to them with power to them and the survivor of them, etc., to appoint from time to time as occasion may require other trustees or trustee to carry into effect such trusts." A letter was found addressed to B. and S. saying that the residue was given to them 'upon trust to apply it for such missionary purposes in Ireland as they should in their discretion think fit.' The will was proved, but the letter was not admitted to probate. The judge held on the evidence that the trust had not been communicated to and accepted by the legatees, or either of them; but he also expressed his opinion that it was void for vagueness, and declared the heir at law and next of kin entitled to the residue. He also tried to make out that if the trust had been a valid one, and had been communicated to and accepted by the legatees, it would be void under the Wills Act; but this certainly is not the law in England (see the chapter on Evasions of the Georgian Mortmain Act).

Missionary purposes.

Re Hewitt, Mayor of Gateshead v. *Hudspeth* (49 L. T. 587) (April, 1883, Kay, J.).

Bequest of £1000 to be invested and the year's interest to be paid on the 9th of November in every year to the new mayor of Gateshead, to be expended by him in acts of hospitality or charity at such times and in such manner as he might think best.

Hospitality or charity.

Held, void on the authority of the decided cases.

In re Sinclair's Trusts (L. R. Ir. xiii. 150) (Feb. 1884).

A trust for charitable institutions or charitable or religious subscriptions purely voluntary and spontaneous, held good.

Stone v. *A.-G.* (28 Ch. D. 464) (Jan. 1885, Pearson, J.).

Bequest: "I desire that the whole of the money over which I have a disposing power be given in charitable and deserving objects":

Deserving.

Held, that the testatrix meant objects which were both charitable and deserving.

Semble, that a gift for deserving objects alone, or for charitable or deserving objects, would be bad.

Re Woodgate (30 S. J. 517) (May, 1886, North, J.). Gift of residue of real and personal estate to one of the executors, upon trust in his discretion to divide the same among the many sick poor with whom he came in contact, or for any other utilitarian purposes that he might approve or choose:

Utilitarian purposes.

Held, that this gift was not confined to charitable objects, and therefore failed for uncertainty.

Obert v. *Barrow* (35 Ch. D. 472) (May, 1887, C. A.). Testatrix gave legacies to a considerable number of charities and societies, amongst others to the Society for the Protection of Animals liable to Vivisection, and the Home for Lost Dogs; and she directed her trustees to pay and distribute all the residue of that portion of her personal estate which might by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those thereinbefore mentioned as might be preferred), and in such shares and proportions as the Earl of Shaftesbury should by writing nominate.

Word charitable implied.

Lord Shaftesbury made an appointment to about 150 charities and societies:

Held (1) that, looking at the whole will, the words "societies and institutions" only meant such as were charitable; and that, assuming the Society for the Protection of Animals not to be a charity, its inclusion would not vitiate the gift.

Lea v. *Cooke* (34 Ch. D. 528) (Feb. 1887, North, J.). A legacy thus: "To General William Booth the sum of £4000 for the spread of the Gospel":—*Held*, good.

This case will be found more fully stated in the chapter on Scheme or No Scheme.

We may add that the following two cases shew that a gift for benevolent purposes is good by Scotch law:—

Benevolent purposes in Scotch law.

Hill v. *Burns* (cited 2 Do. & Clark, 101, in *Ewen* v. *Bannerman*) (1830). A Scotch testatrix directed the residue of her estate to be applied by her trustees "in aid of the institution [? institutions] for charitable and benevolent purposes established, or to be established, in the city of Glasgow or neighbourhood thereof, and that in such way or manner and in such

proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated as to my said trustees shall seem proper," adding, "and I hereby declare that they shall be the sole judges of the appropriation of the said residue for the purposes aforesaid":—*Held*, good.

Miller v. *Rowan* (5 Cl. & Fin. 99) (July, 1837, H. L.). A Scotch testator directed his trustees to apply his residue to such benevolent and charitable purposes as they should think proper, and, if the same should amount to £600 or upwards, he recommended them to apply the proceeds in yearly payments to faithful domestic servants settled in Glasgow; and if it fell short he authorized them to distribute it to such charitable and benevolent purposes as they should think proper:

Recommend.

Held, that the recommendation was imperative, and the trust a good charity, and that by Scotch law a gift for *benevolent* purposes is good.

CHAPTER XIX.

On Incomplete Gifts.

Effect of incomplete gifts.

Cases occasionally arise in which a testator's intentions are not fully manifested, owing to the loss or incompleteness of some document. In these cases, if the existing documents leave the amount of the gift uncertain, it must fail in any case. But, if they only leave the purpose uncertain, the gift will be good if an intention to devote the property to charitable purposes is clearly expressed. In the absence of such an expression of intention the gift will fail.

Digest of cases.

These conclusions are established by the following cases:—

A.-G. v. *Syderfen* (1 Vern. 224; 7 Ves. 43, n.) (Feb. 1683, Lord Keeper). Testator by will charged a manor with the raising of £1000 out of the profits to be applied to such charitable uses as he had by writing under his hand formerly directed, and no such writing was found. The Crown, therefore, directed this £1000 to be applied for the benefit of Christ's Hospital:

Lost document.

Held, that the sum should be raised and invested in land, and the annual proceeds thereof applied for ever as a permanent charity according to the Crown's direction.

London ward.

Baylis v. *A.-G.* (2 Atk. 239) (Jan. 1741). The report merely states: "Two hundred pounds were given under the will of Mr. Church to the ward of Bread Street according to Mr. —— his will."

Blank in will.

All parties seem to have admitted that charity was intended, and evidence was proffered to fill up the blank in the will, but the same was held inadmissible.

A decree was made for a scheme for the application of the £200 to some charitable use for the benefit of the ward.

Mills v. *Farmer* (1 Mer. 55; 19 Ves. 483) (Nov. 1815, L. C. Eldon). Testator, after giving some legacies, said: "The rest and residue of all my effects I direct may be divided for promoting the gospel in foreign parts and in England for bringing up ministers in different seminaries, and other charitable purposes, as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." He made a codicil only giving some private legacies:

Charities to be named.

Held, a good disposition for charitable purposes, and a scheme ordered, in settling which regard was to be had to the charities named by the testator.

Pieschel v. *Paris* (2 Si. & Stu. 384) (Aug. 2, 1825, V.-C. Leach). The Vice-Chancellor stated his view of the will in the following words: "The testator gives to the Governors of Christ's Hospital a legacy of £1000, upon condition that they and their successors for ever do distribute and pay the various annual sums next in his will directed to be paid to the various charitable and other establishments thereinafter mentioned; and for that purpose he gives to the governors of the hospital £30,000 stock bearing interest of 4 per cent. in the London Dock Company upon the trusts after mentioned—that is to say, upon trust that they should receive the dividends and apply the same in the manner and for the purposes thereinafter mentioned. He then directs that of such dividends they shall every year pay £100 to the treasurer of the London Hospital for the sole use and benefit of that charity, and certain other sums amounting to £650 to nine other charitable institutions for the use and benefit of those charities. He then directs that they shall every year pay the sum of other part of the said dividends to the treasurer of to be by him applied for the benefit of that charity; and these blank gifts are four times repeated in the same form of expression. He then directs that they shall every year pay the sum of £200, being the residue of the said dividends, to the Earl of Chichester for the time being to be by him applied to certain other charitable purposes there specified. This last disposition makes it evident that the four blank gifts were intended

Blanks supplied by context.

to amount together to the sum of £250, which, being added to the sum of £750 before given and the £200 after given, would complete the full sum of £1200, being the amount of the annual dividends on the £30,000 stock in the London Dock Company.

"The effect of this will is that it manifests a general disposition of the testator to dispose of the sum of £1200 in charities; but that the testator had not absolutely made up his mind as to the particular charities which should share in the £250.

"I am of opinion, upon the authority of the case of *Mills* v. *Farmer* (1 Mer. 55; 19 Ves. 483), and the cases there referred to, that this Court will execute that general intention; and that it must, in that case, be referred to the Master to approve of a scheme for the application of this £250, having regard to the nature and character of the other gifts contained in the will."

Ewen v. *Bannerman* (2 Do. & Clark, 74) (Nov. 1830, H. L.). A Scotch settlement directed property to be accumulated till it should amount to ——— sterling, and then to be applied to building a hospital and to the maintenance of ——— boys:— *Held*, void for uncertainty.

Blank not supplied.

The settlement directed the hospital to be governed by such rules as the settlor should appoint, and in default of appointment, which happened, by the rules and regulations of an existing hospital.

Semble, this would have been good if the deed had been good in other respects.

NOTE.—This was a Scotch case, involving other points.

A.-G. v. *Fletcher* (5 L. J. N. S. Ch. 75) (Nov. 1835, Lord Langdale, M.R.). Testatrix gave the principal and interest of certain annuities, as they fell in, "to charitable purposes, which should thereafter be specified," or in default of which, according to the best judgment of M., sole executor of her will.

She died without specifying any charitable purposes, and M. renounced probate of her will, but wished to select the charities: *Held*, that the power given to him was incident to his office, and failed by reason of his renunciation; and that the property, being given to charitable purposes generally, ought to be dis-

Discretion incident to office.

posed of in charity in such manner as the king by sign manual might direct.

Commissioners of Charitable Donations v. *Cotter* (1 Dr. & War. 501) (Dec. 1841, L. C. Sugden). Bequest of £350 stock to Y. and A. O. "to be by them applied to charitable purposes according to my instructions deposited with the Rev. A. O." Instructions not deposited.

The instructions given to A. O. were verbal, and were merely to apply it in charitable purposes at his discretion:

Held, that the fund should be applied to charitable purposes by a scheme.

Semble, *Wheeler* v. *Sheer* (Mos. 288, 301) can be rested on no other ground than the alteration of the original purpose by the codicil.

Mayor, &c. of Gloucester v. *Osborn* (1 H. L. 272) (July, 1847, LL. Lyndhurst, Brougham, Campbell, affirming 3 Hare, 136; Nov. 1843, V.-C. Wigram). Testator by will gave all his property to his executors. A codicil was found saying, "In a codicil to my will I gave to the Corporation of Gloucester £140,000. In this I wish my executors would give £60,000 more to them for the same purpose as I have before named." Purpose named in lost document. No other codicil was found:

Held, that both the legacies of £140,000 and £60,000 failed for uncertainty of the purpose.

The Magistrates of Dundee v. *Morris* (3 Macq, 134) (May 1st, 1858, H. L., the L. C. and LL. Cranworth and Wensleydale). Testator left papers saying, "I wish to establish in the town of Dundee [an hospital strictly in size the management of the interior of the said hospital in every way as Heriot's Hospital in Edinburgh is conducted] the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded." What is certain. Another paper said: "I hereby wish only one hundred boys to be admitted to the hospital at Dundee [and the structure of the house to be less than that of Heriot's Hospital] and to contain one hundred boys in place of one hundred and eighty boys." The words in brackets were struck out. Another

paper said: "I beg the Court to nominate a judicial factor to manage my property, etc., to erect an hospital in Dundee to educate the poor children of the nine trades, the name of Morgan to be preferred, although they do not belong to Dundee. I wish that the hospital may not be very expensive, as it is for poor children. The judicial factor is not to take place till the death of my sister Agnes Morgan. If my sister's death was to take place before mine, I wish at my death my house in 17, Coats Crescent, and furniture to be sold, likewise my house and grounds in Calcutta, and the money to go to the fund for the hospital in Dundee to educate the poor children of the nine trades of Dundee, the name of Morgan to be preferred":

Held, not void for uncertainty.

Aston v. *Wood* (L. R. 6 Eq. 419) (July, 1868, V.-C. Giffard). Testator said: "I give to the trustees of Mount Zion Chapel, where I attend, £3500, and appoint as trustees to the same J. W. A. my nephew and T. G., Doves Hill. And I direct that their receipt shall be a sufficient discharge to my said executors, and the money to be appropriated according to statement appended. Any property whatever, book-debts, shares, that above does not dispose of I give to my nephew and residuary legatee Albert Wood."

Document refused probate.

There was no statement appended to the will, but a separate paper was found amongst the testator's effects in his handwriting containing notes of appropriation of seven different sums of £500 each to as many charitable purposes. This paper was not signed, and had been refused to be admitted to probate by the judge of that Court. The two persons named in the will were not trustees of the Mount Zion Chapel:

Held, that the sum was bequeathed upon an incomplete and indefinite trust, and that the bequest therefore failed and the sum fell into the residue.

Gillan v. *Gillan* (L. R. Ir. i. 114) (Jan. 1878, V.-C. Chatterton). Bequest of all property to A. for life and then to C. for life, adding, "And at her death to leave £200 to some orphanage that I may name hereafter":

Some orphanage.

Held, a good charitable gift to be carried out by the Court.

A gift by will of a sum "not exceeding" a specified amount, is not void for uncertainty, but is a valid gift of that amount (*Cope* v. *Wilmot* (1 Coll. 396, n.) and *Thompson* v. *Thompson* (1 Coll. 396)). Compare *In re Sanderson's Trust* (3 K. & J. 497). Sum not exceeding.

In *Hartshorne* v. *Nicholson* (1858, 26 Beav. 58), which will be cited hereafter in the cases on Mortizing, a case will be found of a will with two blanks, one of which was supplied by the context, while the other could not be supplied, and constituted a fatal omission.

CHAPTER XX.

On Gifts for the Benefit of Particular Localities.

The cases which decide that a gift for public purposes at a specified locality is valid are the following:—

Mitford v. *Reynolds* (1 Phillips, 185) (Nov. 1841, Dec. 1842, L. C.). Testator gave the residue of his property thus: "After deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners and never under any plea or pretence to be used, rode, or driven or applied to labour) to the Government of Bengal for the express purpose of that Government applying the amount to charitable, beneficial, and public works at and in the city of Dacca, in Bengal, the intent of such bequest and direction being that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the Government may regard to be most conducive to that end":

Beneficial and public works at D.

Held, on inquiry that the Government of Bengal meant the Governor-General of India:

Held, also, that this trust was a valid charitable trust, and the Court would ultimately direct the money to be paid to the Governor-General.

Dolan v. *Macdermot* (L. R. 5 Eq. 60) (Nov. 1867, Lord Romilly; affirmed L. R. 3 Ch. 676; June, 1868, Lord Cairns). Testator gave his residuary estate, consisting of pure personalty, to trustees upon trust after his wife's death to lay out and bestow the same "in such charities and other public purposes as lawfully might be in the parish of Tadmarton in the county of Oxford," as the trustees should, in the event of his leaving no specific directions by any codicil to his will, think fit. He made no codicil:

Public purposes at T.

Held, a good trust for such charitable purposes in and for the benefit of the parish named as the trustees should think fit.

Wilkinson v. *Barker* (L. R. 14 Eq. 96) (June, 1872, Lord Romilly, M.R.). Testator gave the residue of his pure personal estate to the town trustees of Sheffield upon trust to invest in the funds or such other investments as they might invest their trust monies on and apply the income for such objects of public utility in Sheffield or for such other charitable purposes (not being of an ecclesiastical nature) as the general income of the trust funds belonging to them was applicable.

Public utility at S.

These trustees were an ancient body having large trust funds applicable for public and charitable purposes, with power to invest them in land for widening and improving streets and other like purposes:

Held, a good charitable bequest, and not invalidated by the power to buy land.

Legacy duty.

NOTE.—The testator in this case directed the legacy duty on his pure personalty to be paid out of the proceeds of his realty and impure personalty. And it was held that this could not be done, but the legacy duty must be paid out of the pure personalty.

It is difficult to see on what principle a trust for public works or objects of public utility at a particular place should be held valid, and a trust for public purposes generally should be held void, as was done in *Vezey* v. *Jamson* (1 Si. & Stu. 69, *ante*, p. 199). And, as the former view is more reasonable, the Courts might perhaps hold that the last-mentioned case was overruled by the cases here stated.

We may add a case in which effect has been given to still more indefinite words, namely, "purposes conducing to the good of a whole county"; but in this case the attention of the Court was directed to other points in the case, and the point we are now considering was mentioned in the argument, but does not appear to have received the consideration it deserved.

A.-G. v. *Earl of Lonsdale* (1 Sim. 105) (Jan. 1827, V.-C.). Testator had built a school upon settled land. By his will made

in 1698, he gave land of his own to trustees, in trust to be a fund or to employ and dispose of the rents and profits thereof for the maintenance and salary of the schoolmasters of the free school for which he had erected a house at L., and for the management of the same; or otherwise upon such trusts and for such other purposes as his executors should think most conducing to the good of the county of W. and especially to the parish of L. The testator's successors diverted the school house to other purposes.

Good of county.

Held, (1) that the school was a charity; (2) that the trust to maintain the school failed by reason of the diversion of the school house to other purposes; (3) that the alternative was a good charitable trust, and a scheme should be settled for the application of the rents to some charitable purpose or purposes conducing to the good of the county of W. and especially of the parish of L.

Specific public purpose.

Consistently with these decisions a gift for a specific public purpose at a particular locality is a charitable gift.

Jones v. *Williams* (Amb. 651) (c. 1770, L. C.). Testator gave £1000 to arise by the sale of his real estate for the purpose of bringing spring water from S. or elsewhere to the town of C. for the use of the inhabitants for ever:

Water supply.

Held, a charitable gift and therefore void under the Georgian Mortmain Act.

And gifts for the improvement or for the benefit and ornament of particular towns are also charitable gifts; and so are gifts for the relief of taxes at a particular town, and in aid of rates. On this subject, reference should be made to the chapters on Gifts for Parishes, and Gifts for the Poor; and the following cases may here be added:—

Wright v. *Hobert* (9 Mod. 64, M. T.) (1722, Lord Macclesfield). A piece of land at W. was conveyed several centuries ago to trustees and their heirs, to the intent that as many inhabitants of that village as were able to buy three cows might put them there to grass in the day time from the first Monday in May to the first day of August for ever, and from that day to be in

Common pasture.

common for all the inhabitants there until Ladyday following, and then to be enclosed for raising the grass until the first Monday in May for ever.

Commissioners under the statute 43 Eliz. c. 4, finding only the usage and not the grant, ordered the land to be let for the benefit of the apprenticing of poor boys of the parish; but the grant was produced on an appeal to the Lord Chancellor, and the terms of it were held to be lawful and the decree of the commissioners was reversed.

This is treated by Lord Selborne in *Goodman* v. *Mayor of Saltash* (7 App. Cas. 642) as only being sustainable on the ground that it was a charitable trust.

Howse v. *Chapman* (4 Ves. 542) (April, 1799, L. C.).

Testator directed his executors to convert certain property and thereout pay his debts, adding, "My will is that the residue of the money be appropriated to the improvement of the city of Bath, and be placed by my executors in the bank of Messrs. H. in this city, at the rate of £3 per centum per annum, and that it shall be drawn out of the said bank as the improvements shall require": Improvement of city.

Held, that this was a charitable bequest and therefore void as to impure personalty. The testator's debts and the costs were payable primarily out of the general residue of the testator's personalty, and then out of the pure and impure personalty comprised in the above bequest rateably.

Mayor, etc. of Faversham v. *Ryder* (18 Beav. 318) (March, 1854, Romilly, M.R.; affirmed 5 De G. M. & G. 350; June, 1854, L.JJ. Knight Bruce and Turner).

Testator bequeathed £1000 Bank Annuities to trustees upon trust, after the death of certain tenants for life, "to transfer" the same "unto the mayor and jurats of the town of Faversham, in the county of Kent, being the place of my nativity, to whom I give" the same. "My original intention was that the same should have been applied towards the erection of a tower or steeple of the parish church there, but having been anticipated in that design by a late bequest, which is now carrying into

execution, my desire therefore is that the same may be applied in such manner and for such purposes as the said corporation shall judge to be most for the benefit and ornament of the said town":

Benefit and ornament of town.

Held, a good charity. As the trust might be performed without bringing land into mortmain, a condition to that effect was considered as implied in it: "If one orders a thing to be done, but does not say how it is to be done, surely he must be taken to mean that it shall, if possible, be lawfully done."

Corporation of Wrexham v. *Tamplin* (W. N. 1873, 145) (June, V.-C. Wickens). Testator, domiciled in Australia, but having some property in England, bequeathed to the mayor and corporation of the borough of Wrexham, Wales, a legacy of £1000, to be spent and applied in the discretion of the said mayor and corporation in the best way for the use and benefit of the said borough town or of the inhabitants thereof, or of the institutions in the same borough:

Benefit of borough.

Held, that the legacy was valid, and that it must be applied to and for the use and benefit of institutions which were for a public or charitable purpose. (See 21 W. R. 768.)

Funds of municipal bodies held charitable.

Funds also which have been devoted to the benefit of particular towns by Crown charters or Acts of Parliament have been held to come under the general law of charitable trusts.

A.-G. v. *Brown* (1 Swanst. 265) (April, 1818, L. C. Eldon).

An Act of Parliament appointed commissioners to pave, light, and watch the town of Brighton, and protect it against the sea, and authorized them to levy rates, and a duty on coals:

Held, that a Parliamentary grant of a duty on coals to protect the town against the sea was a charitable trust.

A.-G. v. *Heelis* (2 Si. & Stu. 67) (June, 1824, V.-C. Leach).

A private Act of Parliament appointed commissioners to enclose a common and sell and let it in lots and apply the money in paving, lighting, etc., a town, with power to levy rates for the same purpose:

Held, that the commissioners could be compelled to render

an account of the proceeds of the common in the Court of Chancery. Funds supplied from the gift of the Crown, or the legislature, or from private gift, for any legal public or general purpose, are charitable funds to be administered by Courts of Equity.

A.-G. v. *Mayor of Dublin* (1 Bligh, N. S. 312) (H. L. 1827). Certain Acts empowered the corporation of Dublin to borrow money, lay down water-pipes, and levy rates, and directed them to furnish annual accounts to the Lord Lieutenant to be laid before Parliament, which they did:

Held, that the Court of Chancery in Ireland had jurisdiction to entertain an information and bill charging the corporation with breaches of trust in the matter.

A.-G. v. *Mayor and Corporation of Carlisle* (2 Sim. 437) (1828). The bill and information alleged that certain property had been granted to the defendants by the Crown, on trust to apply the rents thereof in maintaining the peace within the town, and charged that the defendants had misapplied the same. The defendants demurred to this, and this demurrer was overruled, and an appeal from this decision was afterwards dismissed (Ibid. p. 451, n.).

A.-G. v. *Corporation of Shrewsbury* (6 Beav. 220) (May, 1843, Lord Langdale).

Fund for repair of bridge.

A Crown charter of 24 Hen. 6 authorized a corporation to levy tolls on a bridge and apply the same for the repair and amendment of the bridges, gates, towers, and walls of the town, "without yielding any account or reckoning thereof to us or our heirs."

In 1792 the corporation relinquished their right to levy tolls on the bridge in consideration of £6000 raised by subscription, of which £4000 was applied in building a better bridge, and £2000 was invested. The corporation proposed to spend the £2000 on other matters:

Held, that the purpose of the charter was charitable; that the corporation was accountable; that the investments representing the £2000 were held by the corporation in trust to apply the

dividends towards the repairs of the bridges and walls; and they should be restrained from applying them to any other purpose.

A.-G. v. *Eastlake* (11 Hare, 205) (April, 1853, V.-C. Wood).

A local Act appointed commissioners for the town of Plymouth with power to levy certain rates for paving, lighting, watching, widening, and improving streets in the town:

Held, that this was a charitable object, and the Attorney-General could sue to restrain any improper application of the money. The commissioners were accordingly restrained from applying the money in promoting an Act of Parliament to relieve them from some difficulties caused by the Municipal Corporation Act (5 & 6 Will. 4, c. 76) and to restore certain powers given by their original Act.

A.-G. v. *Bushby* (24 Beav. 299) (July, 1857, Romilly, M.R.).

A testator in 1494 devised the use of a certain tenement at G. to the town and community of G. for ever, "for the discharge of the tax of the commonalty of G. to King Henry the Seventh and his successors for ever thenceforth to be granted":

Held, a charity for the benefit of the whole town, and a scheme directed.

Property of a city ward.

But it has been held that property purchased out of the funds of the Tower Ward of the city of London to be used as a watch-house, board-room, and muniment-room, is not the subject of a charitable trust (*Finnis* to *Forbes* (No. 1), 24 Ch. D. 587; V.-C. Bacon, May, 1883).

But in *Baylis* v. *A.-G.* (1741) (2 Atk. 239) a legacy to Bread Street Ward was treated as a charitable gift.

Right of dredging for oysters.

In *Goodman* v. *Mayor of Saltash* (7 App. Cas. 633) (Aug. 1882, H. L.) the corporation of Saltash proved that they had enjoyed a several oyster fishery in certain parts of the river Tamar from time immemorial, saving only that the free inhabitants of ancient tenements within the borough had dredged for oysters there from Candlemas-day to Easter-eve in each year. The corporation wished to contest the legality of this dredging, and brought an action, in which they succeeded in the Courts

below, on the ground that the dredging right could not exist at law. But this was reversed in the H. L.

Lord Selborne suggested (p. 642) that the fishery might have been originally granted to the corporation subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish from Candlemas to Easter. He said, "In such a grant there would be all the elements necessary to constitute what in modern jurisprudence is called a charitable trust. A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants is, as I understand the law, a charitable trust; and no charitable trust can be void on the ground of perpetuity."

There appears to be a conflict of principle between this decision and the judgment of V.-C. Hall in *Prestney* v. *Mayor and Corporation of Colchester* (April, 1882, 21 Ch. D. 111).

Repair of sea bank.

In *Wilson* v. *Barnes* (38 Ch. D. 507) (May, 1886, C. A.) it appeared that Queen Elizabeth had been lady of a manor adjoining the sea, and had made an arrangement with the tenants, whereby they undertook to keep in repair a certain sea-wall, and the Queen's commissioners agreed that the tenants should "have the woods grown in W. Wood for and towards the reparation of the sea dykes." In the course of time the Queen sold the manor, the sea receded, the entire wood was cut down and the proceeds were invested, the lord of the manor took possession of the site, and the tenants claimed the investments representing the proceeds of the wood.

It was held that the woods were devoted for ever to a charitable purpose, and, being no longer required for that purpose, the fund representing them should be applied, *cy-près*, by means of a scheme.

Common of turbary.

In re Christchurch Inclosure Act (35 Ch. D. 355) (March, 1887, Stirling, J.) (on App. 38 Ch. D. 520, March, 1888). A private Act (42 Geo. 3, c. 43) for enclosing certain waste lands at Christchurch, directed certain commissioners, *inter alia*, to allot to the lords of the several manors in which the waste ground were

situated "in trust for the occupiers for the time being of all such cottages and tenements containing less than one acre each as were erected on ancient sites, or have now been erected more than 14 years, in lieu of their rights or pretended rights or custom of cutting turves" in the said waste lands, so much of the same as the commissioners should think proper, not exceeding five acres or inceeding two acres per tenement, for a turf common to be used by the occupiers of such tenements under the control of the lords of the manors and the churchwardens and overseers.

The commissioners awarded 425 acres for the turf common, and a strip of this had been taken by a railway company, and a question was raised as to the proper application of the purchase money.

Stirling, J., considered that this was a special perpetuity created by Parliament for a particular purpose, but the C. A., following the case of *Goodman* v. *Mayor of Saltash*, pronounced it to be a charitable trust.

Rights of freemen of city.

In *In re Norwich Town Close Estate* (W. N. 1888, 173; 32 S. J. 629) the Attorney-General took out a summons under the Charitable Trusts Acts for a scheme to regulate the rights of the freemen of Norwich over certain land. The freemen objected that their rights were corporate rights and not a charitable trust. The material section was sect. 23 of the Act of 1853. Mr. Justice Kekewich held that the Charitable Trusts Acts did not apply unless there was a charitable trust declared by some deed, will, or decree of the Court, and the Attorney-General should therefore first obtain such a decree by independent proceedings.

Apparently the Attorney-General would succeed if he took the proceedings suggested.

CHAPTER XXI.

On Gifts to Doubtful and Defunct Societies.

Doubt as to society.

It often happens that a testator expresses to give a legacy to some society, and no society can be found exactly answering the name and description employed by him. The gift then is not void for uncertainty (*Bunting* v. *Marriott* (1854), 19 Beav. 163); but the Court will decide what society is meant (*Middleton* v. *Clitherow* (1798), 3 Ves. 734).

Evidence admissible.

The rules for determining the object of the testator's bounty are the same for societies as for individuals. Evidence is always admissible of the circumstances of the testator and the possible claimants, so that the Court may realize the state of mind of the testator at the time at which he made his will. If this evidence still leaves a doubt as to the object intended by the testator, then, but not otherwise, declarations of intention expressed by the testator are admissible in evidence (*Wilson* v. *Squire* (1842), 1 Y. & C. Ch. C. 654; *Gibson* v. *Coleman*, W. N. 1868, 96). The Court will, however, decide the question on the first kind of evidence, if possible (*Bradshaw* v. *Thompson* (1843), 2 Y. & C. Ch. C. 295); and, in that view, it has been held that the fact of the testator having subscribed to one society, and not to another, is enough to turn the scale in favour of the former (*A.-G.* v. *Hudson* (1720), 1 P. Wms. 674; *In re Kilvert's Trusts* (1871), L. R. 7 Ch. 170; *In re Briscoe's Trusts*, W. N. 1872, 42; *In re Elizabeth Fearn's Will*, W. N. 1879, 8; *Oldershaw* v. *Governesses' Benevolent Institution* (1887), 3 Times Rep. 668); but this fact will not prevail over an indication of the locality in the will (*Wilson* v. *Squire* (1842), 1 Y. & C. Ch. C. 654).

When the point cannot be resolved by evidence either of

Cy-près application.

circumstances or intention, the Court considers the general intention of the testator to prevail, and applies the fund *cy-près* (*Simon* v. *Barber* (1828), 5 Russ. 112; *Loscombe* v. *Wintringham* (1850), 13 Beav. 87; *Daly* v. *A.-G.* (1860), 11 Ir. Ch. Rep. 41; *In re Hyde's Trusts*, W. N. 1873, 202).

The Court can do this in two ways: either by dividing the fund between all the societies, which may possibly be intended; or by settling a scheme for the administration of the fund. The settlement of a scheme has only been adopted in cases in which the fund left by the testator was reasonably sufficient to be administered by itself (*In re the Clergy Society* (1856), 2 K. & J. 615), or no society at all could be found having for its object that indicated by the testator (*Loscombe* v. *Wintringham* (1850), 13 Beav. 87). When the testator's intention has been to benefit some hospital or extensive charity, the principle of division has been adopted. Moreover, when it has been possible to fix the relative scale of operations of several societies, the fund has been divided rateably (*Bennett* v. *Hayter* (1839), 2 Beav. 81); but, when the operations of the societies have not been easily commensurable, the principle of equal division has been adopted (*Waller* v. *Childs* (1765), Amb. 524; *Bennett* v. *Hayter* (1839), 2 Beav. 81; *Gibson* v. *Coleman* (1868), W. N. 96; *In re Alchin's Trusts* (1872), L. R. 14 Eq. 230).

Where a testator contemplated the existence of several hospitals, and gave the selection to his executor, and then erased the executor's name, the Court selected (*White* v. *White* (1778), 1 Bro. C. C. 12).

Claimants may agree.

In some cases the Court has allowed rival claimants to agree to let a fund be applied in a different way from that which the Court was disposed to favour (*Bunting* v. *Marriott* (1854), 19 Beav. 163; *In re Briscoe's Trusts* (1872), W. N. 42, 76).

Existing association made trustee of fund.

We may remark in this place, that even when a testator devotes a sum of money to a certain purpose, without indicating any society to administer it; still, if a society can be found, which labours to effect the testator's object, and the administration of the fund by means of a scheme would be expensive or

troublesome, the Court may, and often does, hand over the money to the established society (*Bennett* v. *Hayter* (1839), 2 Beav. 81; *In re Maguire* (1870), L. R. 9 Eq. 632; see also *A.-G.* v. *Hankey*, L. R. 16 Eq. 140, n., stated in the chapter on Political Gifts).

Effect of prior dissolution of society.

Finally, it is sometimes found that the testator intended to benefit a society which has ceased to exist. In those cases the gift has been held to lapse, as in the case of the death of an individual, and no case arises for applying the fund *cy-près*. This contrasts with those cases in which a fund has been devoted to some charitable purpose, such as redeeming captives, and in the course of years no objects can be found for its exercise. In such cases the fund is diverted by the Court to some other charitable object.

The result of holding the gift to lapse has been arrived at, whether the society closed in the interval between the date of the will and the testator's death (*Marsh* v. *Means* (1857), 3 Jur. N. S. 790; *Langford* v. *Gowland* (1862), 3 Giff. 617; *Fisk* v. *A.-G.* (1867), L. R. 4 Eq. 521; *Clark* v. *Foundling Hospital*, Highmore, 552), or before the date of the will (*Langford* v. *Gowland* (1862), 3 Giff. 617; *Broadbent* v. *Barrow* (1885), 29 Ch. D. 560), or even after the testator's death, but before the actual payment of the legacy (*Clark* v. *Taylor* (1853), 1 Drew. 642). But the last-mentioned case is opposed to *Hayter* v. *Trego* (1830) (5 Russ. 113), where, under similar circumstances, a fund was applied *cy-près*. And see *A.-G.* v. *Fraunces* (W. N. 1866, 280), stated in the chapter on Foreign Charities.

Subsequent dissolution

When a fund has been actually devoted to the purposes of some charitable society, and the society is afterwards dissolved, leaving the fund unexpended, the fund is applied *cy-près* (*Incorporated Society* v. *Price* (1844), 1 Jo. & Lat. 498; *In re Templemoyle School* (1869), I. R. 4 Eq. 295).

Change of society.

Cases sometimes occur in which one society has expired and another similar society exists, and a question is raised whether the legacy lapses or goes to the existing society (*Coldwell* v.

Holme (1854), 3 Sm. & G. 31; *Makcown* v. *Ardagh* (1876), I. R. 10 Eq. 445).

In *In re Wilson's Will* (1854) (19 Beav. 594), a society merged itself in another after the testator's death, but before the date for payment of a legacy bequeathed to it, and the last-mentioned society received the legacy; but in *Makcown* v. *Ardagh* (1876) (I. R. 10 Eq. 445), a merger took place before the date of the will, and the legacy was held to fail.

The cases on the lapse of legacies to defunct societies also contrast with cases in which some society or official is made the trustee for administering some trust other than the furtherance of its own purposes. In such cases the rule applies that a trust shall not fail by reason of the failure of the trustee, and the Court will preserve the trust, and appoint new trustees if necessary. The cases of *A.-G.* v. *Stephens* (1834) (3 My. & K. 347), and *Marsh* v. *A.-G.* (1861) (9 W. R. 179) are instances of the application of this rule.

Special trust preserved.

A gift to "all the hospitals" has been held to mean, all in the town in which the testatrix lived (*Masters* v. *Masters* (1718), 1 P. Wms. 420).

We can now give in chronological order the cases on doubtful and defunct societies:—

Digest of cases.

Masters v. *Masters* (1 P. Wms. 420) (1718, M.R.).

Testatrix by will gave to the poor of two hospitals in Canterbury (naming them) £5 apiece.

By a codicil she gave "£5 per annum to all and every the hospitals" (without further description). The testatrix lived in Canterbury:

Held, that the hospitals in the codicil meant all the hospitals in Canterbury, but did not include a hospital about a mile out of the town, though founded by the archbishop.

A.-G. v. *Hudson* (1 P. Wms. 674) (M. T. 1720, L. C.).

Testator resided at S., and was a subscriber to a charity school there, of twelve boys and twelve girls. He took an interest in these charity children, and stated he would leave them something at his death. There was a free school in the

same town. Testator by will gave £500 "to the charity school." Apparently the school to which the testator subscribed was most usually known as the charity school:

Held, that the school to which the testator subscribed was entitled to the legacy.

Waller v. *Childs* (Amb. 524) (Nov. 1765, M.R.).

Gift of ultimate residue in trust for the augmentation of the charitable collections which should be then made for the benefit of the poor dissenting ministers of the gospel residing and living in any of the counties of England, to be paid to the treasurer or treasurers of such charitable societies or fund for the time being for that purpose as the major part of them should direct.

There were three such societies, for which annual collections were made, supported respectively by the Presbyterians, Independents, and Baptists:

Held, that the money was divisible between the three societies, but it is not stated in what shares.

White v. *White* (1 Bro. C. C. 12) (July, 1778, Lord Thurlow).

Testator gave half his residue to the Foundling Hospital, and the other half to the Lying-in Hospital, and if there should be more than one of the latter, then to such of them as his executor should appoint. By the will he appointed A. to be his executor, but afterwards erased A.'s name from the will. There were several Lying-in Hospitals at his death:

Held, that the gift to the Lying-in Hospital did not fail, and the Master was directed to report to which it should be paid.

Middleton v. *Clitherow* (3 Ves. 734) (March, 1798, L. C. Loughborough).

Testator bequeathed certain monies "to the society for increasing clergymen's livings in England and Wales for the perpetual purpose of increasing their livings."

An inquiry was directed what society was meant, and it was held that Queen Anne's Bounty was meant, although the rules of that society required all their funds to be laid out in land, and the bequest was thereby rendered void under the Georgian

Mortmain Act. The society afterwards altered its rules in this respect.

Clark v. *Foundling Hospital* (Highmore on Mortmain, 552).

Testatrix, by will in Feb. 1800, left a legacy to the Magdalen Hospital at Bristol. She died in August following, and the hospital was not in existence at her death:

Held, that the legacy lapsed.

Simon v. *Barber* (5 Russ. 112) (July, 1828, M.R.).

Gift to "the treasurer, governor or directors of the Guernsey Hospital for the time being the sum of £200 stock 3 p. c. Bank Annuities, to be applied towards carrying on the charitable designs of the said corporation."

There were two hospitals in Guernsey and nothing to shew which was intended:

Held, not void for uncertainty, but to be applied in charity by the Court.

It is not stated what the Court did, but it can hardly have done else than give half to each hospital.

Hayter v. *Trego* (5 Russ. 113) (March, 1830, M.R.).

Testator, by will dated June, 1819, gave £500 to a voluntary society called "The Plymouth and Devonshire Asylum for the Reception of Female Penitents."

The testator died in June, 1821, at which time the asylum was still in existence; but on May 29, 1822, before the assets could be administered, the society was dissolved, the charitable establishment was broken up, and the furniture and other property belonging to it were sold.

It was held that the fund should be applied *cy-près;* and a scheme was directed. But the only question argued, was whether it should be applied by the Court, or appointed by the Crown, and it was not suggested that the gift lapsed altogether, and no case was cited except *Moggridge* v. *Thackwell* (7 Ves. 78).

A.-G. v. *Stephens* (3 My. & K. 347) (April, 1834, M.R. Leach).

The Act 8 Geo. 1, c. 17 imposed certain duties on merchandize

sent to Portugal. The duties were to be paid to a treasurer appointed at a meeting of the Consul-General and British merchants and factors in Portugal and applied under their superintendence for certain charitable purposes. This was called the British Contribution Fund.

A testator left £10,500 new 4 per cent. funds to the British Consul-General and the treasurer of the British Contribution Fund in Lisbon on trust to pay certain annuities, adding "and as the annuitants drop off the same to devolve to the British Consul merchants and factors to bestow at their discretion at public meetings by plurality of votes to widows and orphans." Special trust.

After the date of the will and before the testator's death, the Act 8 Geo. 1, c. 17 was repealed by the 6 Geo. 4, c. 87, s. 17, and the British Contribution Fund and its treasurer were abolished:

Held, that the testator's charitable gift did not fail, and an order made to appoint a trustee in the place of the treasurer of the fund.

Bennett v. *Hayter* (2 Beav. 81) (July, 1839, Lord Langdale, M.R.). Bequest of "as many thousand 3½ per cents. to the following charities, viz. £1000 to the Jews' poor, Mile End; £1000 to, &c.; to the preachers in the Presbyterian, Baptist and Independent persuasions £1000 to each; £1000 to Quakers' preachers."

It was proved that there were two charitable institutions called hospitals for the relief of poor Jews at Mile End, one governed by persons called wardens and the other managed by trustees.

The Court ordered half the legacy to be paid to the wardens of the first-mentioned hospital, and the other half to the trustees of second hospital, to be applied in each case for the general purposes of the institution.

The Court ordered the Baptist legacy to be paid as to one-fourth to a fund called "The General Baptist Fund," and three-fourths to a fund called "The Particular Baptist Fund," because that was about the proportion of the numbers of preachers of

the two bodies. The Quaker legacy was given to an institution called "The Meeting for Sufferings" of the Quakers.

Wilson v. *Squire* (1 Y. & C. Ch. C. 654) (June, 1842, V.-C. Knight Bruce). Bequest of pure personalty to "the governors and trustees of the London Orphan Society in the City Road, or unto such other person or persons as should be entitled under or by virtue of the rules and regulations established for the government of the said society to receive the same to and for the benefit of the said society."

The legacy was claimed by the Orphan Working School in the City Road, and the London Orphan Asylum, then established at Clapton. The testator had been a subscriber to the latter, but not to the former:

Held, that paying regard to all evidence of the circumstances of the testator and the claimants, the former society was intended by the expression of the will; and there was not such doubt on the point as to admit evidence of the testator's intention.

Bradshaw v. *Thompson* (2 Y. & C. Ch. C. 295) (May, 1842, V.-C. Knight Bruce).

Bequest of residue to be divided equally amongst a list of charities as follows:—"The London Orphan Asylum, Clapton; St. George's Hospital, Hyde Park Corner; Middlesex Hospital, Berners Street; Indigent Blind School, St. George's Fields; Westminster Hospital, Charing Cross; London Hospital, Whitechapel Road; Refuge for the Destitute, Hackney Road; London Ophthalmic Hospital, Moorfields; Seamen's Hospital Society, Bishopsgate Street."

The share given to the Westminster Hospital, Charing Cross, was claimed by (1) the Westminster Hospital in Broad Sanctuary; (2) the Royal Westminster Ophthalmic Hospital in King William Street, Charing Cross; and (3) the Charing Cross Hospital, Agar Street, West Strand. No. 2 was a few yards nearer to the statue at Charing Cross, than No. 3; but No. 3 was a general hospital:

Held, having regard to the other descriptions employed by

the testator, that he meant a general hospital at Charing Cross and No. 3 was the hospital intended.

The Incorporated Society v. *Price* (1 Jo. & Lat. 498) (Ireland, 1844, Lord St. Leonards).

A perpetual rent-charge of £30 per annum was limited to the plaintiff society in 1745 towards the maintenance of a certain school. This was duly paid and applied until 1829, when the school was closed.

It was held that the rent-charge was payable and should be applied *cy-près*.

Loscombe v. *Wintringham* (13 Beav. 87) (November, 1850, Lord Langdale, M.R.). Bequest of £500 to the "governors, guardians, and trustees of a society instituted for the increase and encouragement of good servants," to be expended in such manner as to them should seem most meet towards carrying on the well-planned institution and intents of the said society.

No such institution could be found:

Held, that there was a general charitable intention and the fund would be applied *cy-près*.

Clark v. *Taylor* (1 Drew. 642) (July, 1853, V.-C. Kindersley). "I give to the treasurer for the time being of the Female Orphan School in Greenwich aforesaid, patronised by Mrs. Enderby, the sum of £50 for the benefits of that charity." Will dated March, 1839; he died October, 1840. Mrs. Enderby kept a private school of this nature at her own expense until November, 1846, and then closed it. For some reason the legacy remained unpaid. Mrs. Enderby does not seem to have made any claim. The Crown asked to have it applied *cy-près*:

Held, that the gift failed, and the money fell into the residue.

Coldwell v. *Holme* (3 Sm. & G. 31) (January, 1854, V.-C. Stuart). Bequest of £200 to the treasurer of the Benevolent Institution for the delivery of poor married women at their own habitations. There had been a society of that name and the testatrix had been a life member of it, but it had come to an end ten years before the date of the will. The legacy was claimed by another society, which had existed nearly a century, and which

for thirty years had borne the name of "The Royal Maternity Society," for delivering poor married women at their own habitations.

Ignorance of fact not presumed.

The Vice-Chancellor declined to assume that the testatrix was ignorant that the society, of which she had been a member, had been dissolved, and that there was another society in existence similar in name and identical in purpose; and held "The Royal Maternity Society" entitled to the legacy.

Bunting v. *Marriott* (19 Beav. 163) (November, 1854, Romilly, M.R.).

Bequest of residue to the treasurer of the fund for the superannuated preachers and widows of Wesleyan ministers.

There was no such fund, but there was a fund called "The Worn-out Ministers and Ministers' Widows' Auxiliary Fund," commonly called "The Preachers' Fund," and applied primarily in providing for superannuated preachers and preachers' widows, but sometimes also in making small payments to the children of deceased preachers. There was also a fund belonging to a society called "The Itinerant Methodist Preachers' Annuitant Society," for the benefit of Methodist preachers and their widows, generally called "The Preachers' Fund Society." The testator was an annual subscriber to the former up to his death, and to the latter he had once, in 1826, given a donation of £30. The chief clerk certified in favour of the latter, and the former was satisfied with the finding; but the next of kin contended that the bequest was void for uncertainty:

Waiver of claim allowed.

Held, that the testator must have intended one of the two funds, and as there was no contest between them the certificate would be confirmed. The judge said he thought, if there had been a contest, he should have given it to the former of the two funds.

In re Wilson's Will (19 Beav. 594) (December, 1854, Romilly, M.R.). A reversionary legacy given to society A, which, after testator's death but before the legacy was payable, made over its rights and liabilities to society B. When the time for payment arrived the legacy was paid to society B.

In re The Clergy Society (2 K. & J. 615) (June, 1856, V.-C. Wood). Bequest: "I give and bequeath to the following societies or institutions established or carried on in London the several legacies or sums next hereinafter mentioned, that is to say, to the Church Building Society the sum of £2000" Consols; "to the Clergy Society the like sum; to the Society for Promoting Christian Knowledge the like sum; to the Church Missionary Society, £1000 like annuities, and to the Clergy Orphan Society the sum of £2000 like annuities."

The gift to the Clergy Society was claimed by (1) "The Friend of the Clergy Corporation," formerly called "The Friend of the Clergy Society," having offices in London; (2) "The Clergy Charity," in the diocese of Gloucester and Bristol, to which the testatrix had subscribed, but which had no office in London; (3) the charity for the relief of poor widows and children of clergymen, commonly called "The Sons of the Clergy," having an office in London; and (4) "The Society for the Relief of Poor Pious Clergymen of the Established Church residing in the Country," of which the committee met in London:

Held, that the society intended could not be identified, and the fund would be administered by a scheme for the benefit of the clergy in London.

Marsh v. *Means* (3 Jur. N. S. 790) (1857, V.-C. Wood). A testator left £300 after the death of his widow to be applied for continuing a periodical called 'The Voice of Humanity,' the same to be paid to a treasurer to be appointed by an association which published the periodical. The object of both the association and the periodical was the prevention of cruelty to animals, but both the association and the periodical came to an end long before the death of the testator.

The Vice-Chancellor considered that if the association and the periodical had continued till the legacy became payable, it would have been a charitable gift. But that, as it was, the particular object failed, and the legacy lapsed and would not be applied *cy-près*.

Daly v. *A.-G.* (11 Ir. Ch. Rep. 41) (June, 1860, L. C. Brady).

Testator reciting that he was possessed of, *inter alia*, £4000 stock in the funds, gave it to trustees on trust to pay the income to his sisters during their lives and the life of the survivor, and afterwards he gave £2000 of the stock to one of his trustees beneficially, £1000 to the Protestant school of the parish of P., and £1000 for the use of the Protestant school attached to the Episcopal Chapel in Upper Baggot Street, Dublin.

There was a Protestant school in the parish of P., and an asylum for female penitents in Baggot Street, with an Episcopal Chapel attached, which the testator attended, and there was another Episcopal Chapel in the same street, but no school there:

Held, that the last-mentioned bequest was liable to be applied *cy-près*, as a general charitable intention was manifested.

Marsh v. *A.-G.* (9 W. R. 179) (Dec. 1861, V.-C. Wood). Bequest after the death of A. of £110 to the treasurer and president of the D. Nautical School, in trust to be invested in public funds, and the yearly interest to be applied for the instruction of youth in the practical part of navigation and nautical astronomy. The will was dated Aug. 30, 1854; the testator died in the following month, and A. died in October, 1859. It appeared that in April, 1854, the D. Nautical School, which had previously been conducted by a committee with a president and treasurer, in a room hired for the purpose, was closed by resolution of the committee, and had never since been re-opened:

Special trust.

Held, that the gift did not fail. His Honour said that the case came very near to those in which, from the failure of the object, the legacy had been held to fail altogether, but did not quite fall within the rule. Assuming the testator to have known that the school was closed, still the education directed by the gift was not of necessity in the school itself. The gift was to the treasurer, who might have applied the money in sending boys to Cambridge, or anywhere else where they would receive mathematical instruction. In carrying out the will, the Court would have no hesitation in sanctioning an application for that purpose.

Langford v. *Gowland* (3 Giff. 617) (March, 1862, V.-C. Stuart). Testator gave the residue of his personalty equally between eight charitable societies. One of these had ceased to exist before the date of the will, and two more came to an end before the testator's death:

Held, that the next of kin were entitled to three-eighths of the personalty.

A case of *A.-G.* v. *Fraunces* (W. N. 1866, 280) will be found stated in the chapter on Foreign Charities.

Fisk v. *A.-G.* (L. R. 4 Eq. 521) (July, 1867, V.-C. Wood). Testatrix gave £1000 consols to the treasurer for the time being of the Ladies' Benevolent Society at Liverpool, to be by him held and applied as part of the ordinary funds of the said society.

It was admitted that this was a society with charitable purposes, and it may be presumed that it was a voluntary association. It was dissolved and brought to a close before the death of the testatrix:

Held, that the gift lapsed and was not applicable *cy-près*, but fell into the residue.

V.-C. Wood says in *Fisk* v. *A.-G.*, "There are two decisions, one by V.-C. Kindersley of *Clark* v. *Taylor*, the other by V.-C. Stuart of *Russell* v. *Kellett*, which expressly decide that when a gift is made by will to a charity which has expired, it is as much a lapse as a gift to an individual who has expired.

The case of *Russell* v. *Kellett*, however (3 Sm. & G. 264) (Dec. 5, 1855, V.-C. Stuart), was a case of a gift of certain charitable and other legacies, and then a direction to divide the residue amongst the prior legatees. The Court directed the share apportionable to the charitable legacies to be paid to such of the selected objects of those charities as survived the date of the distribution of the residue.

Gibson v. *Coleman* (W. N. 1868, 96) (March, V.-C. Giffard). Testator, by will in 1864, bequeathed thus: "I give the school of Clare, Suffolk, ten shares in the Union Bank of London."

There were two schools in Clare—(1) the Clare Foundation

School, founded by one Cadge about 1669, at which the testator was educated; (2) the Clare National School, opened in 1859.

Shortly before his death, the testator, on being questioned, had said: "There is only one school; old Armstead will tell you the school he is connected with."

Armstead was the receiver of Cadge's charity, and educated at that school, and was also an active member of the committee for collecting subscriptions for the National School, and had succeeded in getting a donation of £5 for the latter from the testator. On visiting Clare in the autumn of 1859, the testator was taken by Armstead to see the new National School, and expressed himself much pleased with it:

Held, that the legacy should be divided equally between the two schools.

In *Brownjohn* v. *Gale* (W. N. 1869, 133) (May, V.-C. James) there was a legacy of £500 stock to "the treasurer for the time being of a certain voluntary society formed in London in the year 1822, entitled the Irish Society of London, for promoting the education and religious instruction of the native Irish through the medium of their own language." The society existed at the date of the codicil, but not at the testator's death. The legacy was claimed by—(1) "The Irish Society for Church Missions to Roman Catholics," which was located in London; and (2) "The Irish Society for Promoting the Scriptural Education and Religious Instruction of Irish Roman Catholics, chiefly through the medium of their own language," which was located in Dublin. The latter society deposed that the defunct society was merely one of their branches, which had not died but merged in the Dublin society.

The Vice-Chancellor held that the defunct society was a distinct society, and that the legacy failed.

In re Templemoyle School (I. R. 4 Eq. 295) (Dec. 1869). There was a gift in this case of £1000 to support pupils at Templemoyle School. The bequest took effect from about 1843 to 1866, when the school was closed. It was then held that the fund should be applied *cy-près*.

In re Maguire (L. R. 9 Eq. 632) (March, 1870, V.-C. James). Testatrix gave out of her Government stock several charitable legacies, including £200 to the Additional Curates Aid Society in Ireland, £300 to the Church Pastoral Aid Society in England, and £200 to the Church Pastoral Aid Society in Ireland. The will was dated Feb. 12, 1855. At that time there were societies bearing the first two of these names, but no society called the Church Pastoral Aid Society in Ireland, nor was any such society afterwards instituted. But in 1865 the society formerly called the Additional Curates Aid Society in Ireland changed its name to "The Spiritual Aid Society for Ireland." Its objects were always substantially the same as those of the Church Pastoral Aid Society in England, and there was no other similar society in Ireland, and the Church Pastoral Aid Society in England did not extend its operations to Ireland.

It was admitted that the Spiritual Aid Society was entitled to the first of the above three legacies, and

Held, that it was also entitled to the last of them, as the testatrix intended to effect a particular object, which was carried out by that society.

In re Kilvert's Trusts (L. R. 7 Ch. 170) (Dec. 1871, L.JJ. James and Mellish, reversing V.-C. Malins, L. R. 12 Eq. 183). Bequest of £10,000 "to the treasurer for the time being of the Fund for the Relief of the Widows and Orphans of the Clergy of the Diocese of Worcester, to be applied by him for the benefit of that charity."

Will dated July, 1868; testatrix died November, 1870.

A society of the name mentioned had existed from 1777 to 1837, during which period the diocese of Worcester only included the Archdeaconry of Worcester. In 1837 the Archdeaconry of Coventry was added to the diocese, and the society thereupon altered its name to "The Society for the Relief of Clergymen's Widows and Orphans and necessitous Clergymen in the Archdeaconry of Worcester." There was another society for the same purposes in the Archdeaconry of Coventry. The testatrix was the daughter of a clergyman who had subscribed £1 1*s.*

yearly to the Worcester Society till his death in 1817; his widow had continued this till her death in 1860, and the testatrix had subscribed £5 a year from 1860 till her death. Neither the testatrix, nor any of her family, had subscribed to the Coventry Society:

Held, that the gift was to a particular society, and that the Worcester Society was the society intended.

In re Briscoe's Trusts (W. N. 1872, 42) (V.-C. Malins). Gift by will "to the Victoria Hospital, £1000." The legacy was claimed by "The City of London Hospital for Diseases of the Chest, Victoria Park," and by "The Victoria Hospital for Sick Children, Chelsea."

The former presented a petition and gave evidence that the testator was a life governor of their hospital, and had given to it sums of money amounting to £30; that applications had been made to him to subscribe to the respondents' hospital, but he had not done so; also that the institution was commonly known as the Victoria Park Hospital, and was sometimes called the Victoria Hospital.

The evidence of the respondents was that their name was properly "The Victoria Hospital," and that letters addressed to the Treasurer or Secretary, Victoria Hospital, London, were delivered to them, even when posted near Victoria Park.

The Vice-Chancellor held that the description left sufficient doubt to let in evidence, and he held that the testator intended to benefit the hospital with which he was connected. He therefore held the City of London Hospital entitled. The Victoria Hospital, Chelsea, appealed from this decision, but the two hospitals agreed to divide the fund, and an order to that effect was taken by consent: *In re Briscoe's Trusts* (W. N. 1872, 76).

Compromise sanctioned.

In re Alchin's Trusts (L. R. 14 Eq. 230) (June, 1872, V.-C. Malins). Testator gave a legacy to the treasurer for the time being of the Kent County Hospital in aid of that institution. There was no institution called by that name, but claims were put in by the Kent and Canterbury Hospital at Canterbury;

the West Kent General Hospital at Maidstone; the Royal Kent Dispensary at Greenwich; and the Kent County Ophthalmic Hospital at Maidstone.

There was no evidence of the testator's intention beyond the name:

Held, that the testator intended to benefit general hospital purposes and county purposes, and the legacy was therefore divisible between the Kent and Canterbury Hospital, and the West Kent General Hospital.

In re Hyde's Trusts (W. N. 1873, 202) (V.-C. Bacon). Bequest of various charitable legacies, one being "to the Church Building Fund for Native Churches in India, £500." The will contained a declaration that if the specified purposes should on any account fail, the legacies should be applicable to the general purposes respectively.

There was no fund bearing the name above mentioned, but the building of native churches in India was within the general purposes, both of the Church Missionary Society and the Society for the Propagation of the Gospel:

Held, on the construction of the will that the £500 was divisible rateably amongst the other charitable legatees. That is to say, the judge considered that the specified purpose failed by reason of the non-existence of any fund bearing the exact name used by the testator. It would have been more in accordance with the general current of authorities to hold that the testator must have meant one of the two societies mentioned, and to have selected one of them, or divided the legacy between the two. As the case is not in the full reports, the judge may have reconsidered his decision and stopped the report of it.

Makeown v. *Ardagh* (I. R. 10 Eq. 445) (Nov. 1876, V.-C. Court). Bequest of £200 on trust to pay the dividends in aid of the Cork Female Orphan Asylum. Also bequest "to the Patagonian, Chilian and Peruvian Missionary Society the sum of £500, one-third thereof to be applied in aid of the society's labours in each of these countries." The will was dated 16th Feb. 1871.

There was formerly a Cork Female Masonic Orphan Asylum, but in 1868 its funds and liabilities were transferred to the Masonic Female Orphan School, being an institution with similar objects. The situation of the school is not mentioned in the report, but the judge considered it to be a distinct institution quite unconnected with the other.

There was never any society called the Patagonian, Chilian and Peruvian Missionary Society, but there was a South American Missionary Society, which carried on missions in those countries, and to which the testatrix was a subscriber:

Held, that the bequest to the Cork Female Orphan Asylum failed, but that the legacy of £500 was intended for the South American Missionary Society, and was payable accordingly.

NOTE.—The report sets out the words of the will as a bequest to the Cork Female Orphan Asylum; but in the statement of facts, and the argument and the judgment it speaks of the Cork Female Masonic Orphan Asylum as if the word Masonic were in the will.

In re Elizabeth Fearn's Will (W. N. 1879, 8) (V.-C. Hall). Bequest "to the treasurer for the time being of the Society for the Propagation of the Gospel among the Jews." The legacy was claimed by "The London Society for Promoting Christianity among the Jews," and "The British Society for the Propagation of the Gospel among the Jews." The testatrix had subscribed to the first-mentioned society:

Held, that the fact of the testatrix having subscribed to the first-mentioned society turned the scale in its favour, and it was entitled to the legacy.

Broadbent v. *Barrow* (29 Ch. D. 560) (April, 1885, Pearson, J.). Legacy of £500 to the "Ophthalmic Hospital, near Hanover Square, London."

There had been an institution in Cork Street called "The Royal Infirmary for Diseases of the Eye," which had been closed nine years before the testator made his will. The nearest Ophthalmic Hospitals were (1) in King William Street, Charing Cross, and (2) Marylebone Road, both more than a mile from

Hanover Square. There was an orthopædic hospital having an entrance in Hanover Square:

Held, that the institution in Cork Street was the one intended; and that having closed, the gift failed, and the fund was not liable to be applied *cy-près*.

The £500 therefore fell into the residue, which was given to such hospital or hospitals as the executors might think fit.

In *In re Bradley, Oldershaw* v. *The Governesses' Benevolent Institution* (3 Times Reports, 668) (June, 1887, Kay, J.), "the ragged school at M." was held to mean one to which the testatrix had subscribed, and "the national school there" was held to mean the one attached to the parish church.

CHAPTER XXII.

Charge or Trust.

On the question whether a charitable gift is a charge on property or a trust affecting its entirety.

On the right to the surplus income of property after satisfying all expressed charitable objects.

Charge and trust distinguished.

In the case of gifts of property to one or more individuals, with directions for the benefit of third parties, a question is often raised whether the first-named individuals take the property beneficially charged only with the interest conferred on the third parties, or whether the property is given to them as trustees, in which case there is a resulting trust for the settlor or his representatives, if the trust expressed for the third parties does not exhaust the whole interest in the property.

Similar cases arise under gifts with charitable directions superadded; but the decisions in private gifts do not throw much light on charitable cases. In each case the Court looks to the whole instrument and all the surrounding circumstances to ascertain the donor's intention, and professes to do nothing but carry out such intention.

But the circumstances of private gifts and charitable gifts differ widely. The former take effect within a limited period of time; the latter endure for centuries, and it is often found that property, which a testator deemed barely sufficient to answer his purposes some hundreds of years ago, now brings in an income sufficient to cover them ten times over. The Court then has to perform the difficult task of saying what the testator intended in an event which he never even dreamt of. Again, the trustees, or residuary beneficiaries, in private gifts are

usually private individuals themselves; but corporations have often been made the administrators of charitable dispositions, and being themselves of a charitable or quasi-charitable nature, a presumption has often been raised of an intention to benefit them when no such intention would be presumed in favour of an individual. Lastly, the principle of favouring charities was adopted by the Courts in early times, and an expression of a charitable intention respecting part of the income of property has been held to raise a like presumption with respect to the residue of the income, in cases in which a resulting trust would have been raised if no charitable intention at all had been expressed. Lord Eldon, in the case of *A.-G.* v. *Mayor of Bristol* (2 Jac. & W. 294), stated it as his opinion that the last-mentioned principle originated before the doctrine of resulting trusts was established, and would not have been started in his own time, but added that it was too well established for it to be questioned then (2 Jac. & W. 307).

Charity favoured.

The cases which we are about to consider also call for a few other preliminary observations.

The old Plantagenet Mortmain Acts enabled the Crown to seize any land which was conveyed to a corporation. But an important exception to this law was made in favour of the custom of the city of London, enabling freemen of the City to devise hereditaments within the City to corporations without any licence in mortmain. This custom has been recognised in a multitude of cases and a great number of the cases which we are about to examine arose under it. In other cases the founders of charitable institutions procured for them charters of incorporation from the Crown, with licences to take land in mortmain, and then conveyed or devised land to them. Sometimes an existing corporation was made trustee, and then only a licence in mortmain was required. It does not always appear, however, how the old Plantagenet Mortmain Acts were got over; and it is possible that in some of the cases, which will be mentioned below, the Crown might have made, and indeed might still make, some claim to the land or some interest in it. A similar

Ancient modes of founding charities.

remark applies to the statute of 1 Edw. 6, c. 14, relating to superstitious uses. Some of the gifts which have come before the Court shew that the Crown might have made a claim under that Act, and do not shew how such claim was satisfied. In default of any claim by the Crown, the Court was of course bound to settle the rights between the parties before it.

We are now in a position to state the main rules, which have been established respecting gifts to corporations and others for specified charitable purposes, where the property so given produces an income more than sufficient to answer the purposes.

Express direction as to surplus.

First, if the donor has given the whole property in charity (*Kennington Hastings Almshouse* (1611) (Duke 71, B. 623); *A.-G.* v. *Townsend* (1670) (Duke 34, B. 590)), or for some charitable purpose which does not exhaust the whole of it (*A.-G.* v. *Green* (1789) (2 Bro. C. C. 492); *A.-G.* v. *Master of Brentwood School* (1833) (1 M. & K. 376); *In re Ashton's Charity* (1859) (27 Beav. 115)), or has expressly stated that any surplus income, or the whole residue of the income shall be applied for general charitable purposes, or for some special purpose, which is charitable, and which does not exhaust the whole of it, it will be applied in charity accordingly (*A.-G.* v. *Minshall* (1798) (4 Ves. 11); *A.-G.* v. *Earl of Winchelsea* (1791) (3 Bro. C. C. 373); *A.-G.* v. *Caius Coll.* (1837) (2 Keen, 150); *A.-G.* v. *Mercers' Company* (1870) (W. N. 58)). And in like manner, if he has expressly stated that the surplus shall belong to the corporation as part of its general funds, or to a trustee as his private property, it will so belong accordingly (*In re Yordon's* or *Jordeyn's Charity* (1833) (1 M. & C. 416); *Mayor &c. of Southmolton* v. *A.-G.* (1854) (5 H. L. C. 1); *A.-G.* v. *Skinners' Company, Judd's Charity* (1827) (2 Russ. 407); *A.-G.* v. *Gascoigne* (1833) (2 M. & K. 647); *A.-G.* v. *Dean and Canons of Windsor* (1860) (8 H. L. C. 369)), and a conveyance to a corporation for the purpose named as its purpose in its charter of incorporation makes the property so conveyed part of its corporate property (*A.-G.* v. *The Fishmongers' Company, Preston's Will* (1841)

Gift for corporate purposes.

(5 M. & Cr. 16)), and so does a gift to a corporation to enable it to fulfil one of its corporate duties (*A.-G.* v. *Haberdashers' Company* (1834) (1 My. & K. 420)).

General charitable disposition.

Secondly, if the donor has not made an express statement, still, if there is a general disposition of the property for the charitable purposes after mentioned, coupled with a specific appropriation of certain sums for certain purposes not exhausting the whole income of the property, the general disposition is presumed to involve a devotion of the whole property to the charitable purposes named (*Arnold* v. *A.-G.* (1692) (Show. P. C. 28); *A.-G.* v. *Johnson* (1753) (Amb. 190); *A.-G.* v. *Sparks* (1753) (Amb. 200); *A.-G.* v. *Toona* (1792) (2 Ves. Jun. 1); *A.-G.* v. *Drapers' Company, Harwar's Charity* (1840) (2 Beav. 508)).

Conduct of donor.

But this presumption may be rebutted by other evidence, such as the conduct of the donor himself (*A.-G.* v. *Skinners' Company, Fisher's Charity* (1833) (5 Sim. 596)), or other clauses in the deed of gift (*A.-G.* v. *Mayor of Bristol* (1820) (2 Jac. & W. 294)).

Original income all appropriated.

Thirdly, if the testator devotes various sums to various purposes exhausting the whole of the existing annual value of the property, any subsequent increase will be apportionable rateably to the various objects mentioned by him, with power for the Court, however, to apply the share of any charitable object to any other charitable object under its elastic jurisdiction with respect to charities (*Thetford School Case* (1609) (8 Co. Rep. 130); *Sutton Coldfield Case* (1635) (Duke 68, B. 642); *A.-G.* v. *Mayor of Coventry* (1702) (Show. P. C. 22); *A.-G.* v. *Johnson* (1753) (Amb. 190); *A.-G.* v. *Barham* (1835) (4 L. J. N. S. Ch. 128); *A.-G.* v. *Christ's Hospital* (1841) (4 Beav. 73)). This principle has been extended to cases in which the specified objects did not quite exhaust the whole existing annual value of the property, but left a margin so small that no intention to benefit the donee could be presumed from it (*Mercers' Company* v. *A.-G.* (1828) (2 Bligh N. S. 165)). And if it appears on the face of the will or other instrument that the donor believed he was giving the whole income of the property for charitable

Small margin.

purposes, the whole will be so given although the real value of the property at the time is not known now (*A.-G.* v. *Wilson* (1834) (3 M. & K. 362); *A.-G.* v. *Marchant* (1866) (L. R. 3 Eq. 424)).

Fixed balance is not residuary.

Fourthly, where the testator mentions the annual value, and gives certain sums out of it to certain objects and then gives the balance to the persons in whom the property is vested, or to some other object, the last-mentioned gift is not regarded as residuary, but as a specific gift of the ascertained portion of the income not previously appropriated. In these cases therefore an increase of income does not go to the last-named object, but is apportioned amongst all the objects (*A.-G.* v. *Caius Coll.* (1837) (2 Keen, 150); *A.-G.* v. *Coopers' Company* (1840) (3 Beav. 29); *A.-G.* v. *Drapers' Company, Kendrick's Charity* (1841) (4 Beav. 67); *A.-G.* v. *Jesus Coll. Oxon* (1861) (29 Beav. 163)).

Definite purposes may be increased.

And where the whole property is given for several objects, some of which are definite in extent and others indefinite, an increase in the income will not be bestowed entirely on the indefinite objects, but the definite objects will be increased also, both in number and allowances (*A.-G.* v. *Corporation of Rochester* (1854) (5 De G. M. & G. 797)). But if the terms of the gift give the whole income to the indefinite purpose after satisfying the definite objects, the object or objects of the indefinite purpose will take the whole (*A.-G.* v. *Smythies* (1833) (2 R. & M. 717); *A.-G.* v. *Solly* (1835) (5 L. J. N. S. 5)).

A fixed balance held residuary.

And in one case it was held that the terms of the gift indicated that the corporation trustee was to take the whole surplus, although the existing rent of the land was mentioned in the will and so was the amount of the existing balance which the corporation took subject to certain charges (*A.-G.* v. *Mayor of Beverley* (1853) (6 H. L. C. 310)). The House of Lords considered that the last gift in this case was residuary; that any loss of income fell just upon it, and that it included any increase of income.

Fifthly, where the original disposition leaves a balance of

income undisposed of, but there is a direction that such balance shall be laid out in keeping the property in repair, the whole income is devoted to charity, and any future increase will be applied accordingly (*Merchant Taylors' Company* v. *A.-G.* (1871) (L. R. 6 Ch. 512); *A.-G.* v. *Wax Chandlers' Company* (1873) (L. R. 6 H. L. 1)). Balance given for repairs.

Sixthly, where the original disposition leaves a substantial balance of income undisposed of, and 30*s.* has been regarded as substantial 300 years ago (*A.-G.* v. *Brazenose Coll.* (1834) (2 Cl. & F. 295); *A.-G.* v. *Trin. Coll. Camb.* (1856) (24 Beav. 383)), and there is no direction for laying out such balance in repairs or general devotion of the whole property to charitable uses; then, instead of a resulting trust for the donor, the surplus is considered as given to the administrators of the charity as a benefit for themselves (*A.-G.* v. *Mayor of Bristol* (1820) (2 Jac. & W. 294); *A.-G.* v. *Cordwainers' Company* (1833) (3 M. & K. 534); *A.-G.* v. *Groeers' Company, Laxton's Charity* (1843) (6 Beav. 526)). Substantial balance left.

This result is more easily arrived at when the corporation is of a charitable nature, like a college in the universities (*A.-G.* v. *St. John's College, Cambridge* (c. 1832) (1 Coop. 394); *A.-G.* v. *Brazenose College* (1834) (2 Cl. & F. 295); *A.-G.* v. *Trinity College, Cambridge* (1856) (24 Beav. 383)), especially if the new gift entails the admission of new members to share the benefit of an old foundation, as the members of the old foundation may naturally expect some benefit as an inducement to them to admit the new members (*A.-G.* v. *Catts Hall* (1820) (Jac. 381)). Colleges favoured.

A prospective increase of income has sometimes influenced the Court to decide in favour of the trustees (*A.-G.* v. *Cordwainers' Company* (1833) (3 M. & K. 534); *A.-G.* v. *Trinity College, Cambridge* (1856) (24 Beav. 383)); but in other cases it has been held insufficient to rebut the presumption of intention against them (*A.-G.* v. *Mayor of Coventry*) (1702) (Show. P. C. 22)). Prospective increase.

Seventhly, in considering whether the trustees of the pro-

perty shall be gainers by an increase of income, the Court considers whether they would be losers by a diminution of the income. Therefore, if they bind themselves to make certain payments, whether the property produces sufficient money or not, there is strong ground for holding that they take any surplus (*A.-G.* v. *Mayor of Bristol* (1820) (2 Jac. & W. 294); *A.-G.* v. *Trinity College, Cambridge* (1856) (24 Beav. 383); *Jack* v. *Burnett* (1846) (12 Cl. & F. 812)). Conversely, if the charities are to lose by a fall, that gives ground for holding that they are to gain by a rise (*A.-G.* v. *Marchant* (1866) (L. R. 3 Eq. 424)).

Obligations undertaken by trustees.

Eighthly, the existence of a gift over on failure to perform the trust is evidence of an intention that the trustees take the surplus beneficially; but it may be regarded as merely an extra precaution, enabling some other persons to become new trustees if the first set make default. Such a clause occurred in the case of *A.-G.* v. *The Cordwainers' Company* (1833) (3 M. & K. 534); *A.-G.* v. *Fishmongers' Company, Knesworth's Will* (1841) (5 M. & Cr. 11); *Jack* v. *Burnett* (1846) (12 Cl. & F. 812), which were decided in favour of the donees taking the surplus beneficially; and in the following cases which were decided against them: *A.-G.* v. *Coopers' Company* (1840) (3 Beav. 29); *Merchant Taylors' Company* v. *A.-G.* (1871) (L. R. 6 Ch. 512); *A.-G.* v. *Wax Chandlers' Company* (1873) (L. R. 6 H. L. 1).

Gift over.

Ninthly, the Court will regard contemporary acts of the donor as shewing the intention of his gift (*A.-G.* v. *Skinners' Company, Fisher's Charity* (1833) (5 Sim. 596); *A.-G.* v. *Brazenose College* (1834) (2 Cl. & F. 295)).

Acts of donor and donee.

But, tenthly, contemporary acts of the donee are immaterial, as only shewing what the donee understood, and not what the donor intended (*A.-G.* v. *Trinity College, Cambridge* (1856) (24 Beav. 883)).

We may add that when a second fund is given to the uses of a former will, and those uses consist of one charitable disposition of defined extent, and another charitable disposition of the surplus, and the property passing under the former will was

Trusts by reference.

sufficient to answer the first purpose of defined extent, the whole of the second fund is applicable to the purposes of the surplus of the former will (*A.-G.* v. *Hartley* (1793) (4 Bro. C. C. 412)).

Resulting trusts.

We see here that resulting trusts for the donor have never been raised in these cases. But we apprehend such a trust might arise in a clear case of a gift to an individual, upon trust to apply part of the property given for some charitable purpose, leaving the residue of the property undisposed of (*A.-G.* v. *Wilson* (1834) (3 M. & K. 362)).

Digest of cases.

We will now state the cases which have been mentioned above, arranging them in chronological order :—

Thetford School Case (8 Co. Rep. 130) (E. T. 7 Jac. 1) (1609). This was a question arising on an application for a private Act of Parliament, referred by the House of Lords to certain judges. It is stated in the report that land of the value of £35 in 1567 was devised to certain persons in fee for the maintenance of a preacher four days in the year, of a master and usher of a free grammar school, and of certain poor people, and a special distribution was made by the testator amongst them, amounting to £35 per annum; and that afterwards the lands increased in value.

It was resolved that the income of the land should be employed to increase the stipend of the preacher, schoolmaster, &c., and poor, and if any surplusage remained it should be expended for the maintenance of a greater number of poor, &c., and nothing should be converted by the devisees to their own uses.

On turning to *Gibbons* v. *Maltyard* (Popham, 6) it will be seen that the school originated under a devise of a much more complicated nature. The testator really devised land to A. on condition that A., within a certain number of years, assured land worth £35 per annum to trustees for the purposes named; and in default of A.'s doing so, he gave the devised land to such trustees. A. made default, and the trustees recovered the devised land from A. The case therefore goes rather further than appears from the report in 8 Co. 130.

Land recovered.

Kennington Hastings Almshouse (1611) (Duke, 71, B. 623),

(Ellesmere, C.). D. being seised of lands at T., let on lease for £10 per annum, devised the rents of the same land for the maintenance of the poor in a certain almshouse. His heir entered into receipt of the rent, and regularly paid over £10 a year to the almshouse, but on the expiration of the lease he re-let the lands at £40 per annum.

It was held by the Commissioners, and on appeal by the Lord Chancellor, that the heir must pay over the whole £40 per annum and all arrears. A case was referred to the judges, who certified that a devise of rents included future improved rents, and in fact passed the land itself.

Devise of rents.

Sutton Coldfield Case (1635) (Duke, 68, B. 642), before Commissioners under the Act of Elizabeth. Resolved, if lands of the value of £3 a year be given to maintain a schoolmaster, and in the deed it is expressed that the £3 shall only be employed to maintain that use, and no other use is expressed in the deed, and afterwards the land increaseth to a greater value, all the increased rent shall be employed for maintenance of that charitable use, because it doth not appear that the donor had any intention that the profits of the land should be employed to any other use, and at the first he gave so much as the land was worth.

Other points in this case arose concerning notice to a purchaser, and the jurisdiction of the Commissioners.

A.-G. v. *Townsend* (1670) (Duke, 34, B. 590) (Chancery). R. leased a farm for ninety-six years, at £7 per annum, payable to himself during his life and after his death at £6 10*s.*, payable as to £3 10*s.* to the Master, &c., of Christ's College, Cambridge, for the maintenance of a poor scholar there, 40*s.* to the minister, &c., of S., and 20*s.* to the overseers of the poor of B. for the relief of the poor. He conveyed the inheritance to trustees upon trust after the expiration of the lease to apply all the rents for the relief of the poor scholar and the poor of S. and B. The lease expired in 1649, and the trustees only paid £6 10*s.*, as before, till 1670, although the land was re-let at £30 per annum.

The whole £30 was decreed to be paid to the scholar and the poor according to their proportions of the £6 10*s.*

Arnold v. *A.-G.* (Show. P. C. 28) (H. L. affirming a decree of the Court of Chancery, made in T. T. 1692). Testator being seised in fee of the manor of F., worth £240 per annum, and of some personal estate, gave to his heir-at-law 40*s.*, and gave some other legacies, all out of his personal estate, and added: "Being desirous to settle for the future, after the death of me and my wife, the manor of F., with all the lands, woods, and appurtenances, to charitable uses, I devise my manor of F., with the appurtenances," to A. B., &c.; and their heirs, upon trust, they or their assigns, after the death of the testator and his wife, should pay yearly several particular sums to charitable uses therein mentioned. The sums mentioned only amounted to £120 per annum.

Recital of desire.

It was held that the whole of the rents and profits of the manor were devoted to the charitable uses mentioned in the will.

A.-G. v. *Mayor of Coventry* (2 Vern. 397) (M. T. 1700), on appeal to H. L., Feb. 1702 (Show. P. C. 22; 2 Bro. P. C. 236; Colles, 280). Certain lands in 34 Hen. 8 then subject to leases for lives at a total rent of £70 per annum, but of much greater annual value, were conveyed by the Crown to the corporation of Coventry for about £1400. It appeared that one Sir Thomas White provided £1000 at the time and £400 a little afterwards (see C. J. Holt's judgment, 3 Mad. 353, and 2 Jac. & W. 305, n., and 322), and the corporation agreed with him by certain articles to apply £45 per annum to place out apprentices and lend to decayed tradesmen; £5 per annum to the mayor and aldermen of Coventry, and £20 per annum to the Merchant Taylors' Company; and after thirty years the £45 per annum was to be applied in rotation at Leicester, Northampton, Warwick, and Coventry. The annual rental of the lands had increased to £300 per annum:

Held, by the House of Lords, reversing C. J. Holt and others, that the surplus rental was applicable for charitable purposes.

Obligation to apply property.

This case is commented on by Lord Eldon in *A.-G.* v. *Mayor of Bristol* (2 Jac. & W. 322), and stress is laid on the fact that the corporation of Coventry incurred no liability to make the payments, except out of the rents, and that the payments exhausted the rents at the origin of the charity; so that the corporation were in the position of trustees.

A.-G. v. *Johnson* (Amb. 190) (Nov. 1753, Lord Hardwicke). Testator by will in 1612 devised the whole profits of the tythes in G. to be disposed of for ever to the uses thereafter specified, and then gave to several charitable and public uses several certain sums to be paid annually, which together made up the value of the tythes at that time. The tythes rose from £20 to £57 per annum:

Held, that the whole was applicable for the purposes mentioned by the testator, and it was referred to the Master to consider how they should be augmented.

A.-G. v. *Sparks* (Amb. 200) (Dec. 1753, Sir John Strange, M.R.). Testator by will made in 1723 devised all his real estate to D. for life, and then to the ministers of J., M., and A. to the uses thereinafter expressed, that was to say, to pay his debts, to pay two life annuities, and to purchase a house near M. for six poor men or women, and to pay to each of them 2*s.* 6*d.* a week; and he gave to the minister of H. £4 a year for ever.

The trustees paid the testator's debts out of the rents, including a mortgage debt of £400, and had £139 in hand, and they had contracted to buy a house. The property was more than sufficient to buy the house and pay the sums mentioned:

Held, that the surplus should go in augmentation of the sum of £4 to the minister of H. and the allowances to the poor men and women.

Travelling fellowships.

A.-G. v. *Green* (2 Bro. C. C. 492) (1789, Lord Thurlow). Testator in 1714 devised all his lands in Yorkshire to his executors in fee on trust to pay £600 per annum for two travelling fellowships at Oxford, adding that the yearly overplus of the rents and profits of the said Yorkshire estate, he

willed to be paid for ever to University College, Oxford, for the buying of perpetual advowsons for the members of the said college. He also desired that the estate should be conveyed to the college, if it lawfully might be so conveyed, in trust for the performance of the uses and trusts thereinbefore declared of the same.

The trustees conveyed the estate to the college, under the sanction of the Court. At first the rents were insufficient to provide the two travelling fellowships, but at length they brought in a surplus, and the college purchased advowsons till they possessed as many as half the number of their fellows, which they deemed the full number they might hold according to the Georgian Mortmain Act; and the Lord Chancellor appeared to assent to this idea. They then applied the further surplus in increasing the livings already purchased and increasing the stipend of the head of the college. Purchase of advowsons.

The judgment of the Lord Chancellor is not very clear, but it indicated that the surplus was applicable *cy-près* if any *cy-près* application could be found.

A.-G. v. *Earl of Winchelsea* (3 Bro. C. C. 373) (M.R. 1791) (S. C. sub nom. *A.-G.* v. *Hurst*, 2 Cox, Eq. Ca. 365). Gift of residue to trustees in trust to invest in the funds and pay out of income £12 per annum to a schoolmaster, to be nominated by the trustees, for teaching all the children of the parish of R. to read, write, cast accounts, and say their catechism, and to lay out 20*s.* per annum in the purchase of such books as they shall think proper for the use of the children, and to apply the surplus income "if any there shall be after such payment as aforesaid, in the clothing and putting out apprentices, two children of the parish of R. aforesaid and one child of the parish of W." Accounts. Catechism. Books.

The residue of pure personalty of the testator produced an income more than sufficient to answer all those purposes:

Held, that the whole residue was devoted to charity, and the surplus should be applied *cy-près* by means of a scheme.

A.-G. v. *Toona* (2 Ves. Jun. 1) (Nov. 1792, Lord Eyre) (S. C. 4 Bro. C. C. 103, sub nom. *A.-G.* v. *Haberdashers' Company*).

Letters patent incorporated the company, and made them governors of a free school founded by one Adams. By deed, dated 26th Nov. 1656, Adams conveyed to the corporation an estate of about £200 per annum for the maintenance of the school "and other pious and charitable uses." A deed, dated the next day, specified the manner in which the school was to be carried on, the stipends to be paid, and directed some other sums to be applied for other charities, the whole involving an outlay of £175 per annum, the same to be paid out of the rents. Power was reserved to the founder to manage the school and its property, to make leases reserving £175 per annum or more, to cut timber and dispose thereof by will. He demised the land to a nephew of his for twenty-one years at £175 per annum. By will he desired this lease to be renewed at the same rent, and left the timber to the corporation, directing them to raise thereout £400 or £500, and lay it out in land to be settled on them for the better securing and more sure payment of the several sums of money appointed to be paid to them, taking care to leave wood enough for repairs. It was provided (apparently by the will) that if any sums should fall in by neglect of duty by those who should take beneficial interest, they should go to the charity; and that the corporation should visit, and the expense be defrayed out of some of the funds devoted to the charities. By an Act of Parliament in 1660, the estate was exempted from taxes. The testator died in 1661. The lease was renewed for a term of seventy years at the old rent. It expired in 1784. The land was worth much more than £175 per annum. The heir-at-law of Adams claimed the surplus; the trustees claimed nothing for themselves:

Direction to renew lease.

Held, that the surplus was devoted to the charity, and the mode of its application should be settled by a scheme. The gift to the charity in the first deed remained, subject to the qualifications of the second deed.

A.-G. v. *Hartley* (4 Bro. C. C. 412) (July, 1793, L. C. Thurlow). A., before the Georgian Mortmain Act, gave the residue of his real and personal estate on trust to settle an annuity of £60 on

each of seven gentlemen to be added to the eighteen poor knights of Windsor, to be charged on land to be purchased for that purpose, and gave the surplus of his estate to be settled for the maintenance and education of boys at Christchurch Hospital in the study of mathematics.

His estate was more than sufficient to satisfy the first trust. Then B., after the statute, gave £10,000 pure personalty to be applied to the uses of A.'s will: Trust by reference.

Held, this was a gift to the uses of the surplus only, and was good; but, *semble*, it would have been otherwise if A.'s estate had been insufficient to purchase the lands required for his first trust.

A.-G. v. *Minshull* (4 Ves. 11) (June, 1798, M.R.). Testator, by will made in 1719, devised the residue of his estate, subject to certain life interests, to trustees in trust to apply 40*s.* per year out of the profits in buying coats for poor men and women in the liberty of W. in the parish of A., and 50*s.* out of income for the expenses of meetings, and 20*s.* for receiving the rents, and directed the residue of the rents and profits to be employed in placing out poor children of settled inhabitants of the said parish, provided that the sum to be allowed for putting out each child should not exceed £10.

In the course of time the income of the estates was more than sufficient to apprentice all the poor children in the parish at £10 a head.

The heir-at-law claimed the surplus rents after allowing £10 a head for each child who was an object of the trust:

Held, that the testator intended the whole income to go to the charities, and the amount of the apprenticeship fees should be increased, and the allowance for coats might be increased also.

The information appears to have alleged that proper situations could not be obtained for so low a fee as £10, but the judgment does not allude to that allegation.

A.-G. v. *Master, &c. of Catherine Hall, Cambridge* (Jac. 381) (Feb. 1820, Lord Eldon). Testatrix, by will dated Nov. 3, 1743, gave all her estate to trustees, on trust to pay certain annuities

and other private bequests, and "when the annuitants are dead and other things performed, and a site of ground purchased or procured for erecting a building for the reception of six fellows and ten scholars in St. C.'s Hall, then to convey all her real estate to the master and fellows thereof for the uses and purposes hereinafter mentioned, viz. for erecting the buildings aforesaid, and the maintenance of six fellows and ten scholars there, and for other uses in such manner and under such directions as contained in a writing hereto annexed. I appoint that the buildings on my estate be kept in repair, that the rents continue the same as at my decease, and that leases be not made for a longer term than eleven years."

New foundation in old college.

The writing annexed to the will contained a long set of rules for the administration of the trust. Some fines were imposed for non-residence, to be applied as after directed to the common stock of the college. And a further rule directed the fines and the surplus rents to be "thrown into the common stock of the college and improved if it may be as a fund for the repairs of the college in general, as well the old as the new buildings, or the discharge of any debt that may now lie on the old college on account of the buildings already erected, or the making any additional buildings, or buying of books for the library, or other such public uses within the said college."

The testatrix died in 1745. A decree for administration was made in 1752, and in 1769 the estates were conveyed to the college under the decree of the Court. The rents of the lands were raised, and in the course of time they produced a large surplus. This was now claimed by the fellows of the trust created by the testatrix as against the master and fellows of the original foundation:

College takes surplus.

Held, that the testatrix must be presumed to have intended the surplus to go to benefit the old foundation as an inducement to the members of the old foundation to admit the new trust to be attached to it. It is mentioned that a perpetual direction that rents shall not be raised is void, as repugnant to the estate granted, in charitable gifts as well as in private ones.

A.-G. v. *Mayor of Bristol*, sub nom. *Shepherd* v. *Mayor of Bristol* (3 Madd. 319) (Oct. 1818, V.-C. Leach) (on app. 2 Jac. & W. 294; Dec. 1820, L. C. Eldon). By an indenture, dated July 1, 1566, made between the mayor of Bristol and others, it was recited that Sir T. White had paid £2000 to the corporation of Bristol as well for the benefit and commodity of the said city of Bristol, and inhabitants of the same, as also of other cities and towns thereinafter specified, and to be employed to such other uses, purposes, and intents as thereinafter mentioned, to the intent that the corporation should purchase hereditaments of the clear yearly value of £120 and more; and that the corporation had thereout purchased hereditaments of the clear yearly value of £76; and the corporation agreed within four years to purchase other hereditaments of the clear yearly value of £120 together with those already purchased, all such lands to be employed and bestowed to and for the uses and intents thereinafter mentioned, and the rents thereof to be employed in manner therein specified, and to no other uses, intents, or purposes. The corporation then covenanted that they would on St. Martin's Day, Nov. 11, 1567, and in each of the other eight years next thereafter, *i.e.* after 1566, lend two sums of £50 each to two young freemen of Bristol, free of interest for ten years, such sums when repaid to be relent to others in like manner for ever; and that they would on the same day in the year 1575 pay to certain officials of the town £200 to form a perpetual fund for buying corn wholesale and retailing it without profit to poor people resident in the city. And it was further agreed between the parties thereto that the corporation out of the rent, issues, and profits of the said lands purchased and to be purchased by them, after the end of the said ten years in which £1000 was to be paid, that was to say, eight years for sixteen young men, and two years for the provision of corn, should yearly pay to the city of York and the other cities and towns thereinafter mentioned, the sums thereinafter mentioned for the purposes thereinafter mentioned, that was to say, on St. Bartholomew's Day, Aug. 24, 1577, £104 to the corpora-

No other uses.

Covenant by trustees.

tion of York, to form a loan fund of £100 and £4 for their trouble, and the like sum in succeeding years to twenty-one other towns and one company, for similar purposes; then in the year 1600, £100 was to be lent at Bristol on St. Martin's Day as before, and thereafter £104 was to be paid yearly on St. Bartholomew's Day, first to Bristol and then to the other towns and company in rotation as before, for the same purposes as before. All these loan funds were to be perpetual. It was further agreed that if the corporation of Bristol made default in paying any sum of £104 they should forfeit to the president and scholars of St. John's College, Oxford, £110 for the first offence, £115 for the second, £120 for the third, £130 for the fourth, £140 for the fifth, and £150 for every subsequent default, out of which penalty the sum of £104 was to be paid to the party entitled thereto. There was then a proviso that if at any time the hereditaments should be notoriously decayed by any sudden misfortune by reason of fire or any like occasion, or be recovered from the corporation by legal process, so that the remaining rents should be insufficient to answer the charges before mentioned and the necessary repairs, the payments should cease until the decay was remedied, and the corporation should apply the rents to remedy the decay, and then restore the uses of the indenture.

Penalty clause.

Proviso in case of loss.

The corporation of Bristol appear to have acquired some other hereditaments to the value of £120 per annum with those previously purchased, and in the course of years the annual value of the hereditaments very much increased.

The object of the information was to have the surplus rental devoted to charitable purposes. A demurrer was put in to the information.

It was held by the Lord Chancellor, reversing the judgment below, that the corporation were entitled to the lands for their own use, subject only to payment of the specific sums mentioned in the deed. The grounds of this decision were—(1) that the charges upon the property did not exhaust its estimated rental at the institution of the trust; (2) that the corporation under-

took personally to pay the sums for the first ten years, whether the property produced enough money or not; (3) that the penalty clause was inconsistent with any rateable increase of the sums; and (4) that the indemnity clause was different from the indemnity by law given to trustees. The Lord Chancellor also considered that the practice of centuries was entitled to weight in considering the construction of an ancient document. These reasons outweighed the argument founded on the words of the deed, that the rents were to be applied in manner specified, and to no other uses, intents, or purposes.

Practice of centuries.

A.-G. v. *The Skinners' Company* (No. 1), *Judd's Charity* (2 Russ. 407) (July, 1826) (April, 1827, L. C. Eldon, varying V.-C. Leach (5 Madd. 173), March, 1820). Testator devised specified lands to the Skinners' Company, directing them to pay £20 a year to the master of a school he had established at Tonbridge, £8 a year to the usher, £10 a year to themselves for visiting the school, 4*s.* a week to certain almsmen, and 25*s.* 4*d.* yearly in coals for the almsmen, 10*s.* to the renter-warden of the company, adding, "And I will the residue of all the rents, &c., of the premises bequeathed to the said master and wardens, shall be employed by the said master and wardens for the time being upon needful reparations of the messuages or tenements aforesaid, and other overplus thereof remaining I will shall be to the use and behoof of the said company of Skinners to order and dispose at their wills and pleasures."

Visitation fee.

The testator during his lifetime appropriated some of the specified lands to the school, and so superseded his will. The other lands apparently shewed a surplus of £5 10*s.* 4*d.* over the specified payment at the time of his death, and this surplus had increased to £640:

Held, that the company were entitled to the lands passing under the will free from any trust, except that of paying the almsmen, the renter-warden, and the coals, and contributing to the expense of repairing the original school, and to an increased allowance of £200 a year for visiting the school, rateably with the other lands according to their respective rentals.

Mercers' Company v. *A.-G.* (2 Bligh. N. S. 165) (1828) (H. L., affirming Court of Exchequer). B. by deed in 1616 conveyed an advowson and certain land to nineteen persons, subject to a lease having apparently thirty-four years to run, reserving a rent of £150 a year. By a contemporaneous deed he directed them to pay the rents to the wardens of the Mercers' Company, adding that the latter "should dispose of all the said monies so from time to time to be paid to the uses following." The uses were to pay a fee-farm rent of £29 per annum, affecting the premises; to the receiver for two half-yearly acquittances, 1*s.*; to the mayor, &c., of W. for the poor there, £20; to four poor brethren of the Mercers' Company, £5 each; for releasing poor debtors, £24; poor in London, £14; Christ's Hospital, £20; a dinner for the company, £20; the wardens of the company, £1; the clerk, £1; the beadle, 10*s.* These sums will be found to amount to £149 11*s.* A clause provided for the abatement of these sums if the rent should fall. Some separate trusts were declared of the advowson not affecting the main question.

Dinner.
Wardens.
Clerk.
Beadle.

It was held that the settlor intended the whole rents to be applied for the charitable purposes mentioned in his will after satisfying the fixed sums therein mentioned.

The decree left it open to the company to claim an increase of the allowance for a dinner and the payments to its officers. The Lord Chancellor expressed his opinion that the existence of a surplus over the sums mentioned was evidence of intention only, and that any presumption arising therefrom was rebutted by the smallness of the surplus and the introductory words.

Small margin.

A.-G. v. *St. John's College, Cambridge* (1 Coop. 394; Shelford on Mortmain, 594) (c. 1832, Lord Brougham). D. by royal licence had founded a fraternity and grammar school at P. By deed in 1525 he conveyed lands to the master and fellows of St. John's College, Camb., to the intent that they should maintain in their college five scholars, to be nominated by the fraternity at P. After the dissolution of the fraternity an Act of 5 Edw. 6 regulated the school, and gave power to the master and others to nominate the five scholars.

It was held that the college took the lands beneficially, subject

only to the duty of maintaining five scholars nominated as above mentioned, with such allowances as were made to other scholars in the college.

A.-G. v. *Smythies* (2 R. & M. 717) (Jan. 29, 1833, L.C. Brougham, varying Leach, M.R.). By royal letters patent of Oct. 9, in the 8th Jac. 1 (1610), in the Latin language, a hospital was incorporated at C., consisting of one master and five poor, and it was ordered that there should be one master of the hospital and its property, and that he should be the minister of the parish of M. in the town of C., and that there should be five poor persons who alone, either men or women, should be supported, relieved, and maintained in the said hospital, and for their support, relief, and maintenance they should have, enjoy, and receive through the hands of the master annually 52*s.*, by quarterly payments. Power was given to the master to remove almsmen for misconduct, and to fill up vacancies. The master and the almsmen and their successors were constituted a body corporate. The Lord Chancellor was constituted visitor, with power to appoint future masters. The master was empowered to make statutes with the consent of the Attorney-General and Solicitor-General. And the income of all property of the hospital was directed to be expended for the support of the master and poor of the hospital, and the support, maintenance, and repairs of its houses, tenements, and possessions:

Master of hospital.

Held, by the Lord Chancellor, reversing the Master of the Rolls, that the master was entitled to pocket the whole income of the property of the hospital after paying 52*s.* per annum to each of the five almsmen.

Part of the land of the hospital was at one time leased to the Board of Ordnance for the erection of barracks, with power for the board to remove the same at the end of the lease. When the lease expired the Board of Ordnance and the master agreed that the barracks should be pulled down, and the material sold, and half the proceeds paid to the master in consideration of his restoring the ground. The master received £5000 under this agreement:

Sale of material.

Held, that the capital of the £5000 belonged to the hospital, and that the master was only entitled to receive the income thereof.

Grammar school.

A.-G. v. *Master of Brentwood School* (1 M. & K. 376) (March, 1833, Leach, M.R.). The Crown by letters patent authorized A. B. to found a grammar school, and endow it with land worth £36 per annum, and appoint a master and two wardens, the same to form a corporation, with the right of appointment vested in A. B. and his heirs. The letters patent seem to have confined the benefit of the school to the parish of S.; but gave to A. B. and his executors power to make ordinances. A. B. appointed a master and wardens, and conveyed lands to them and their successors, to the intent that they should perform the ordinances to be made by A. B. or his executors, and to be corrected when to him and his heirs should seem expedient.

A. B. by will made in 1565, reciting that neither school nor master's house were yet provided, gave a house and ground to the master and guardians to such uses and intents, and according to such ordinances and declarations, as by him, his heirs and executors should be declared. He also devised his parsonage of D. to the master and guardians and their successors, to the intent that they should find five poor folk in S., to be named by himself during life, and then by J. and H. successively during their lives, and then by the owners of his manor of S., in such manner as by himself and his executors should be declared.

Ordinance giving surplus to master.

The heir of A. B. at first claimed the hereditaments devised, but submitted to a decree for their conveyance to the master and wardens, with a direction that ordinances should be framed by the Bishop of London, the Dean of St. Paul's, and their successors, and himself and his heirs. Ordinances were framed accordingly, giving the master the surplus income of the property, after defraying certain charges. It appeared that in the course of centuries the revenues had very much increased and the school had dwindled, so that the master paid some small sums to others to do the work, and pocketed over £1000 a year.

It was held that the whole of the property was devoted by A. B. to the school and the poor, that the ordinance giving the whole income to the master was invalid, and a scheme was ordered. The Master of the Rolls, in giving judgment, said: "It is the settled principle of this Court in the administration of charity property, given not for purposes of individual benefit but for the performance of duties, that, if the revenues happen to increase so as to exceed a reasonable compensation for the duties, the surplus must be applied to other charitable purposes." Excess over reasonable remuneration.

A.-G. v. *Skinners' Company* (No. 2), *Fisher's Charity* (5 Sim. 596) (April, 1833, V.-C. Shadwell). In the former case of *A.-G.* v. *Skinners' Company* (2 Russ. 407) it was held that certain lands which had been conveyed to the company by Sir A. Judd in his lifetime were entirely devoted to the purpose of the school. The conveyance of these lands appears to have been lost, but its purport was inferred from two private Acts of Parliament passed soon after to protect the title of the company against a fraudulent claim which was set up. Now the private Acts affected also certain other property which had been conveyed to the company by a deed still existing; and the object of the present suit was to claim the surplus rental of the last-mentioned property for charitable purposes. The deed ran as follows: "To all, &c., know ye that I, being instigated by piety, as well for the sustentation of the free school at T., as for the sustentation of one student at Oxford, have granted to the master, &c., of the Skinners, governours of the possessions, revenues, and goods of the said school, all that, &c., to hold, &c., to fulfil the works, uses, and intentions in the schedule annexed." The schedule ran: "The good works, uses, and intents proposed and intended by H. F. to be done with the rents of the hereditaments comprised in the deed." It directed yearly 53*s.* 4*d.* to be paid to the student at Brazenose College, Oxford, 13*s.* 4*d.* to his tutor, 33*s.* 4*d.* to the principal and scholars of Brazenose; two sums of 10*s.* each for two sermons to exhort the company to quiet virtue and concord, and to be favourable and beneficial maintainers of the school; four speci- Sermons.

fied tenants were to continue on at 6*s.* 8*d.* quarterly, during good behaviour, and afterwards the same tenements were to be let at the same rents to poor men and women of the company. There was nothing further declared. The property brought in £10 13*s.* 4*d.* at the time, and the above-mentioned charges amount to only £6. The company always, both during the life of H. F. and afterwards, applied the surplus rents to their own use. The property now brought in £149 per annum:

Fixed rents.

Margin.

Held, that the private Acts only confirmed the title of the company, and did not alter it, and that the company were entitled to the surplus rents.

In re Yordon's or *Jordeyn's Charity* (5 Sim. 571) (Dec. 1832, V.-C. Shadwell), affirmed on appeal, sub nom. *In re Jordeyn's Charity* (1 M. & C. 416) (May, 1833, L. C. Brougham). Testator by will in 1468 devised messuages in London to the Fishmongers' Company, and directed that the wardens of the company should yearly for ever "purvey, buy, and deliver 138 quarters of coals, or else money to buy the same coals, unto the same number, after the price of 8*d.* for every quarter of the said coals, to be delivered and disposed by the advice and discretion of one good man or two of every parish wherein the said coals shall be given and distributed." The will then specified the parishes and the number of recipients, and continued: "The sum total in money for all the foresaid 138 quarters of coals, after the foresaid price of 8*d.* for every quarter, amounteth to the sum yearly of £4 12*s.*, the which coals unto the said whole number I will that they be given and distributed in the form above said yearly and for evermore between the feast of Michaelmas and the feast of Christmas next ensuing; and if the said coals be bought for less price than is aforesaid, that then there be delivered and given more coals, after the good discretion of the wardens of the said craft of Fishmongers for the time being." There was a further gift of 40*s.* a year to the wardens of the company, and the residue was given to keep the premises in repair, and subject thereto "to the most necessary and profitable use of the said craft or mystery of Fishmongers":

Coals or fixed price.

Proviso for fall in price.

Held, that the company had an option of distributing £4 12*s.* per year or the coals, and were not bound to distribute 138 quarters at the present price. Option.

A.-G. v. *Gascoigne* (2 M. & K. 647) (Dec. 3, 1833, Leach, M.R.). Testator in 1620 left certain money to his executors to be invested in land on trust to employ the profits to such godly uses as thereinafter expressed, and to no other use; that was to say, they should build an asylum at S. for twenty-four legitimate orphans between seven and fifteen years old, each to have £5 a year for maintenance, and provide a master to instruct the orphans in the art of grammar and the established religion, the master to have a room to lodge in and £30 per annum, and an usher to have 20 marks (£6 13*s.* 4*d.*) per annum. The will then provided for the appointment of the master and selection of the orphans, and directed 40 marks per annum to be paid towards maintaining four poor scholars at St. John's College, Cambridge, from the said school, all orphans to be sent to the university, or placed out as apprentices, at fifteen and a half years old. And the testator directed that, the hospital being erected and the several payments being made, the residue of the yearly value of the lands should remain to his executors, their heirs and assigns for ever, and to their sole and proper use for ever. No other use. Residue to trustees.

The orphan asylum was built, lands were duly bought, and the payments made for many years, but latterly some default was made in the payments, though the rent of the lands had increased in value enormously:

Held, that the owner of the land must pay all arrears of the specified payments, continue the payments, and also keep the asylum in repair, but that he was entitled to the whole rents after paying the sums mentioned in the will, which could not be increased, because money had fallen; also that writing and arithmetic should be taught in the school.

A.-G. v. *Cordwainers' Company* (3 M. & K. 534) (Dec. 16, 1833, Leach, M.R.). Testator by will in 1547 devised certain tenements in London to the Cordwainers' Company, "for the only interest, use, and performation of this my will in manner Only use of will.

and form following." He then directed £6 a year to be paid to his brother for life, and 40*s.* a year after the brother's death to his wife for life, and £5 a year in alms in the parish of D. by 12*d.* a house to every poor householder and to such as shall be most needy and poor, by the discretion of the churchwardens of D. and the overseers of the will. He also willed that the company should cause a mass to be sung yearly in the church of D. for his soul and others, and distribute 6*s.* 8*d.* to poor strangers, and that the master and wardens of the company should have 10*d.* each for their attendance, and each of the churchwardens of D. 12*d.* He appointed an overseer of his will, and provided that if the company should not duly perform his will, but cease to do so for the space of one whole year, his brother might recover the property, and hold it in fee.

Mass.

Overseer of will.

Gift over.

The tenements thus devised brought in £6, £5, and £1 6*s.* 8*d.* at the date of the will, but the rental had increased to £358:

Held, that the property was not devised upon trust, but upon condition of the company making the fixed payments mentioned in the will, and that the company was entitled to the surplus after making those payments. It would seem that the rental of the property shewed a surplus of 13*s.* 6*d.* at the testator's death; but one of the charges upon it was the annuity of £6 a year to his brother, followed by a reversionary annuity of £2 a year to his widow. Both these were bound to fall in, so that there was no disposition of the whole rent in charity.

A.-G. v. *Wilson* (3 M. & K. 362) (March, 1834, Leach, M.R.). Testatrix in 1710 devised all her real estate to trustees upon the special trust and confidence thereinafter mentioned and expressed, and she directed them to apply certain sums for certain charitable purposes, and gave certain life annuities, and gave the amounts of the annuities for charitable purposes after the deaths of the annuitants. The will contained a direction to buy real estate, to be added to that devised, and a codicil recited that the testatrix had bought some, and directed it to be considered as answering the direction to buy, and the codicil also varied the charitable dispositions of the will. Another codicil

in 1716 devised other after-purchased hereditaments as an augmentation of one of the charities. Since the death of the testatrix the lands had increased in value, and the trustees had a surplus in hand. The heir-at-law was brought before the Court to claim the surplus under a resulting trust, and the point was argued for him :

Held, in the absence of evidence of the value of the estates at the dates of the will and codicils, that it appeared that the testatrix thought that she was giving the whole income in charity, and the surplus was applicable for charitable purposes accordingly. Belief of testatrix.

A.-G. v. *Haberdashers' Company* (1 M. & K. 420) (March, 1834, L. C. Brougham). Land was conveyed in 1646 to certain members of the defendant company on trust to make certain annual charitable payments, and to pay "to the master and wardens of the said company £8 yearly for increase of their stock of corn for the service of the market in London." "And the rest and residue of the said rents and profits to be paid yearly to the said master and wardens for the further increase of their stock of corn." The corporation compelled every company to keep a certain stock of corn, and at times fixed the price at which it was to be sold. This was to prevent scarcity. The company sometimes sustained losses, and sometimes made gains by its corn trade : Stock of corn.

Held, that the above was a gift for the benefit of the members of the company, and not a charity at all.

This case (*A.-G.* v. *Haberdashers' Company*) (1834) may be relied on for two purposes. First, it establishes that a gift to a corporation for the fulfilment of one of its corporate duties becomes part of the corporate property, and does not constitute an independent charitable trust. Secondly, it establishes that a gift to A., to enable him to carry on a particular trade, is regarded as a gift for the benefit of A., and not of his possible customers. In the case of an individual, therefore, such a gift would place the property under A.'s absolute control. This consideration Corporate duty. Aid of a trade.

has some bearing on the effect of directions to publish private manuscripts, which we have already discussed.

A.-G. v. *Principal, &c. of Brazenose College* (2 Cl. & F. 295) (August, 1834, H. L. affirming the M. R., only one judgment being given, namely by L. C. Brougham). The view of the facts taken by the Lord Chancellor was as follows:—The charity was founded in 1572 as a sort of joint foundation of A. Nowell and Queen Elizabeth. The object of the foundation was the reinstatement of the school of M. as a free grammar school; and this was effected by making the master and the school a corporate body, and by appointing governors and visitors, namely the master and six senior fellows of Brazenose College, and making them also a body corporate. The charter then pointed out that six scholarships should be appointed to Brazenose College either from M. school, or W., or B., and failing all these three from other schools in Lancashire; that they should be chosen by the master of the college; and power was given to the master and six senior fellows, the governors of the school, with Dean Nowell during his life, and by themselves after his death, to make ordinances for governing the school and scholars, and concerning the stipends of the masters of the school, and touching anything whatever relating to the school, in the order, governance, receiving and disposition of the rents and revenues for the support of the school and scholars. It then gave rents to the governors to the intent that out of the same they should give to the master 20 marks (£6 13*s.* 4*d.*) by the year at the least, to the under master 10 marks, and to six poor scholars 5 marks by the year. Licence was given to hold other land of the value of £100 per annum for the support of the school and the poor scholars of Brazenose College. Dean Nowell acted as visitor during his life, and during the whole of that time the surplus rents were applied to the use of the college with his consent; and even the stipends of the scholars, when there was a want of objects, were applied to the use of the college. The rent was at first at least £66 13*s.* 4*d.*, and the charges upon it were

College.

Acts of donor.

£65 3*s.* 4*d.* The Lord Chancellor considered the difference, £1 10*s.*, to be more than a trifle, and to distinguish this from the *Thetford School Case*. The rents had increased to more than £700 per annum. Margin.

The Court dismissed the information, thus holding the college entitled to the surplus, to manage the school as it thought fit, and to appropriate the stipends of the scholars, where none appeared, and to consolidate the scholarships.

A.-G. v. *Barham* (4 L. J. N. S. Ch. 128) (March, 1835, M.R.). Devise in 1602 of property producing £10 per annum on trust to pay sums of 54*s.*, 30*s.*, 20*s.*, and 54*s.* for certain purposes, and the other 42*s.* of the said yearly rent of £10 to the discretion of the parson and churchwardens and common council of a certain parish to dispose to the poor, or towards paying of fifteenths. The rent increased:

Held, that all the charities should share in the increase of rent, and a reference directed for a scheme.

Obs.—In this case 30*s.* was given to provide an annual dinner for all householders and married people of the town of B., and 20*s.* for a supper for all the young people of the same town, any of the testator's kindred being also admissible to each repast. The question whether these purposes are charitable was not discussed. The other purposes were clearly charitable. Dinner. Supper.

A.-G. v. *Solly* (5 L. J. N. S. Ch. 5) (Nov. 1835, M.R.). In this case a testator devised land in 1690, on trust to apply certain portions of the income for charitable purposes, and to lay out the balance in building almshouses at Southampton. The Master of the Rolls observed that the testator did not confine his bounty to any particular period or to any particular sums, but directed the almshouses to be maintained and increased in number from time to time for ever, according as moneys should arise. He referred back the Master's report to be reviewed, on the principle that the testator had devoted particular sums to particular charities, and the residue to the ultimate charity. Balance.

A.-G. v. *Caius Coll.* (2 Keen, 150) (May, 1837, Lord Langdale, M.R.).

P. by will made in 1615 left £5000 to be invested in loans to certain corporations so as to produce £250 per annum, and directed the founding of a school in connection with Caius College and the establishment of certain fellowships and scholarships in the college, and he appointed the master and four senior fellows of the college to be supervisors of his will. He directed the £250 arising from the £5000 to be applied by his supervisors in paying £40 to the master of the school, £20 to the usher, £168 1*s.* 4*d.* to other purposes, £6 13*s.* 4*d.* to repairing the buildings of the college and increasing its funds, £3 to the master of the college, and 30*s.* to each of the four senior fellows, thus leaving £6 5*s.* 4*d.* undisposed of, and adding, "the remainder of the said £250 per annum I will shall be from time to time bestowed in such charitable uses as my executors for their times and after my supervisors shall think fit."

If the intended investment of the £5000 could not be carried out (which happened) he authorized his executors to invest it in land producing £250 per annum. This was done, and eventually the rental of the land rose to £2000 per annum. When this land was conveyed to the college, a deed was executed whereby the college authorities covenanted that any surplus arising from the land should be invested in other land, and that the income produced thereby should be applied *cy-près*, in effect. This, however, was not done, but the surplus income was pocketed for many years, but a few years prior to the filing of the information the misappropriation was to some extent redressed and inquiries were being made with the view of setting things straight:

Selection of self not allowed.

Held, both on the will and on the deed, that the remainder of £6 5*s.* 4*d.* was applicable to such charitable uses other than their own pockets, as the master and four senior fellows might select, and a like proportion of the increased income was so applicable, and the other objects of the testator's bounty were entitled to augmentation according to a scheme to be settled; that the master and fellows should remain trustees and have their costs;

and that writing, arithmetic, and other subjects should be added to the subject of grammar to be taught in the school.

A.-G. v. *Drapers' Company* (No. 1), *Harwar's Charity* (2 Beav. 508) (June, 1840, Lord Langdale).

Testator by will dated 1703 bequeathed £1700 to his executors in trust to lay out £100 more or less in the purchase of a piece of ground for erecting twelve almshouses, and about £400 in building the same, and to convey the same to the Drapers' Company for three poor men and three poor women of the company, and the like of the parish where the almshouses should be built, and he directed the remainder of the £1700 to be laid out in the purchase of an estate of £60 a year or thereabouts to be conveyed to the Drapers' Company for the maintenance and support of the six poor men and six poor women in the almshouses for ever, in manner following, that is to say, in trust that the Court of assistants of the said company for the time being, by and out of the rents and profits of the said estate to be purchased, should from time to time monthly, by themselves or agents, pay and distribute to the said six poor men and six poor women, or such number of them as should be in the said almshouses, 6*s.* apiece, and once every year to each of them a load of good coals, and upon a yearly visitation to each of them 1*s.* apiece.

Or thereabouts.

The allowance required £43 4*s.* per annum. The property was producing £145 per annum:

Held, that as the maintenance and support of the almspeople was the expressed purpose for which the conveyance was directed to be made to the company, the mere circumstance that in describing the manner of maintenance and support the testator had not exhausted the whole income, was not a sufficient reason for considering that any surplus was meant for the pecuniary benefit of the company.

A.-G. v. *Coopers' Company* (3 Beav. 29) (June, 1840, Lord Langdale).

Testator by will in 1573 gave a house to his wife for life and then to the Coopers' Company, "upon this condition, and

Gift on condition.

to this use, intent and purpose, that is, to the maintenance, augmentation and upholding of the school house of R., and the same rent of the aforesaid house, which is now rented at £11 by the year, the which money my mind and will is shall be bestowed in manner and form following." He then gave yearly "to the schoolmaster of R. £3 6*s.* 8*d.*, to the usher £1 13*s.* 4*d.*, to the master wardens of the Grocers' Company 40*s.*, for a sermon 6*s.*, to the parson at St. Michael's 12*d.*, to the church-wardens 2*s.*, to the clerk and beadle of the Grocers 2*s.*, to the clerk and beadle of the Coopers 2*s.*, to a carpenter appointed by the master wardens of the Grocers 2*s.*, and to the master wardens of the Coopers 5*s.*" The remaining £3 he gave to the master wardens of the Coopers towards the repairs of the house, and directed the other legacies to fail if the house failed to produce rent; and if the wardens of the Coopers failed to bestow the £8 a year properly, he gave the house to the master wardens of the Grocers' Company, to do with it as shall seem good to them.

Sermon.
Clerk.
Beadle.
Carpenter.
Specified balance.
Gift over.

The rent of the house had increased up to £75 per annum:

Held, that the Coopers' Company were beneficially entitled to three-elevenths of the surplus rental over £8 per annum, subject to the duty of keeping the house in repair; and they were trustees of the other eight-elevenths for charitable purposes.

The principle was clearly stated in this case, that if a testator states an intention to give the whole income of property in charity, but does not specifically dispose of the whole, the existing surplus and any future surplus will be given in charity; and if he does not state any such general intention, but does in fact specifically give the whole existing income in charity, any future surplus will be given in charity also.

The result arrived at in this case was adversely criticised by the Lord Chancellor in *Mayor, &c. of Beverley* v. *A.-G.* (6 H. L. C. 324).

A.-G. v. *Fishmongers' Company, Preston's Will* (2 Beav. 588) (November, 1839, Lord Langdale, M.R.), on appeal, 5 M. & Cr. 16 (January, 1841, L. C. Cottenham).

This case illustrates the custom of the city of London whereby citizens were empowered to devise lands within the City to corporations without any licence in mortmain. The case recognises it as a legal Act for a corporation to purchase land in the name of a citizen, and for that citizen to devise it to the corporation.

Purchase by Company.

The Fishmongers' Company had a charter dated 1433 containing a licence to hold land in mortmain to the value of £20 a year "in auxilium sustentationis pauperum hominum et mulierum misteriæ et communitatis prædictarum in perpetuum."

Henry Preston by will (apparently in Latin) dated 1435 devised land to the company, adding the words above set out:

Held, on the evidence that Henry Preston in his lifetime was a trustee for the company, and that the land was part of their corporate property applicable for their corporate purposes, and not applicable by the Court under its jurisdiction to administer charitable trusts.

Corporate purposes.

A.-G. v. *Fishmongers' Company, Knesworth's Will* (2 Beav. 151) (November, 1839, Lord Langdale); on appeal, 5 M. & Cr. 11 (January, 1841, L. C. Cottenham).

Testator by will dated April 13, 1513, devised certain tenements to the Fishmongers' Company, on trust to repair and rebuild the same premises, so that the rents might be kept sufficient to fulfil his bequests. He then directed certain obits to be observed and certain sums to be paid to priests and poor people to pray for his soul, and to a prior and convent to find a priest to say mass and pray for his soul, and the bell-ringer of the convent was to have a noble for assisting a priest. The testator then directed 40*s.* a year to be applied for the benefit of the prisoners in Newgate and Ludgate. He directed the company to keep an account of the rents and employ a receiver, the Chamberlain of London was to have 3*s.* 4*d.* and a breakfast on attending to see the accounts, and if the account was not made, the company was to pay 10 marks out of the property to the city of London. The surplus rents, with 100 marks from his personal estate, were to form a repairing fund and a loan fund

Superstitious trusts.

Bell-ringer.

Penalty.

Superstitious trust.

for members of the company, the borrowers of which were to pray for the testator's soul. And in case the company made default in performing the trusts, the testator gave the property to the city of London, upon the same trusts, except as to the loan fund.

The testator died in 1529. Afterwards the Act 1 Edw. 6, c. 14, passed, vesting in the Crown all property devoted to the maintenance of obits or other like things. An arrangement was then made between the Crown and certain trustees for the City companies, whereby the latter paid £18,744 11*s.* 2*d.* to the Crown, and the king by letters patent of 4 Edw. 6 expressed to grant to the trustees certain rent-charges, including a grant of a rent-charge out of hereditaments of the Fishmongers' Company which they had been accustomed to apply for anniversaries of Sir T. Kneseworth, the above-mentioned testator.

Arrangement with Crown.

The course of decisions under the Act soon shewed that it was open to argument that the Crown took the whole of the lands devised by such wills as Sir T. Kneseworth's, and not merely the rent-charge mentioned in the letters patent. Thereupon a private Act (4 Jac. 1, c. 10) was passed, vesting in the respective companies all right of the Crown to any lands mentioned in the letters patent, but saving the rights of other persons.

The company had regularly paid the 40*s.* per year for the benefit of prisoners in Newgate and Ludgate, and claimed to be entitled to the property subject to that sole trust.

The information was filed, claiming that the Crown at the most only became entitled to a rent-charge out of the land, and that the company only took such rent-charge under the letters patent and the private Act; and that the whole of the surplus rental of the property was applicable for charitable purposes. The information seems to have claimed further that the Crown took the rent-charge subject to the performance of the charitable trusts of the will divested of their superstitious conditions:

Held, that the company took the property beneficially subject to the specific trusts mentioned in the will; that all such trusts

were superstitious under the Act 1 Edw. 6, c. 14, except that for the prisoners of Newgate and Ludgate, and that the property devoted to such superstitious trusts vested in the Crown and passed to the company.

NOTE.—It would seem that the disposition of the residue in this case was tainted with superstition, and so passed from the Crown to the company.

A.-G. v. *Drapers' Company* (No. 2), *Kendrick's Charity* (4 Beav. 67) (March, 1841, Lord Langdale).

Testator by will in 1624 left £2400 to the Drapers' Company to purchase lands of the clear yearly value of £100, and thereout pay various sums amounting to £96 in all to certain specified charitable objects, adding, "The residue of the said sum of £100 a year (being £4 yearly) for ever, I entreat the four warders of the same company to accept for their pains to be equally divided between them, by 20*s.* to each of them for the time being yearly for ever." Specified residue.

The sum was paid to the company, lent by them at £6 10*s.* per cent. for twelve years, and then laid out with £150 more in purchasing freeholds producing £170 per annum. These were burnt down in the great fire, but the property now produced £311 per annum:

Held, that the company did not take the whole surplus beneficially, but only 4 per cent. on the income; and that the charitable gifts should be increased in proportion to the increase of rental: that the £150 must be considered as an increase of the £2400 arising from the extra interest for twelve years, and that the whole property was devoted to the testator's purposes. The defendants were ordered to pay the costs, as they contested the case, but an account was only directed from the filing of the information.

A.-G. v. *Christ's Hospital* (4 Beav. 73) (March, 1841, Lord Langdale).

Testatrix by will in 1601, reciting that she was seised of a house in London of the yearly rent of £10, devised it to the governors of Christ's Hospital, upon special trust and confidence

that they should pay to the parsons and churchwardens of the three parishes of A., B., and C., for ever, 40*s.* apiece for the most needy poor of their parishes, and to E. W. £4 yearly for life, and after her decease the £4 to be divided as follows: 40*s.* to the parson and churchwardens of A. parish in augmentation of the relief of the poor, 20*s.* ditto B. parish, and 20*s.* ditto C. parish. The rent of the house had increased to £82:

Held, that the whole was devoted to the special objects mentioned by the testatrix, and the defendants must account for the rents since the filing of the information and pay the costs of the suit.

A.-G. v. *Grocers' Company, Laxton's Charity* (6 Beav. 526) (Jan. 1843, Lord Langdale, M.R.). L. by codicil in 1556 devised to the wardens, &c., of the Grocers' Company certain hereditaments in the city of London, "to hold the same unto them and their successors for ever upon this condition and intent, that is to say," that they, within as convenient time as they could, should make suit with his executors to the Crown to obtain a messuage called the Guild House at O. and use it for a school-house and almshouse for seven poor men. And he willed that the company should provide a schoolmaster and usher, and yearly pay the master out of the issues, rents, and reversions of the hereditaments devised to them, for his stipend and wages yearly, £18, and to the usher, £6 13*s.* 4*d.*; and he also willed them, with the consent of the vicar of O., to appoint seven poor men to be bedesmen to live free in the said messuage, and that the company should yearly pay out of the issues of the aforesaid lands to each of the poor men, 34*s.*, being 8*d.* a week, and to the vicar of O., 24*s.*, to be employed in the reparation of the school.

Condition.

Bedesmen.

The testator died in 1556, and the company accepted the devise, but did not obtain possession of the property devised to them till 1573, owing to disputes with the testator's widow and heir-at-law; and then it produced £50 per annum, while only £38 per annum was required to satisfy the payments mentioned in the will. The company also obtained a grant of the Guild House at O., and established the school, and from time to time

increased the master's salary, but always kept for themselves a considerable portion of the rent.

The property devised to the company was burnt in the great fire of London in 1666, and an arrangement was then made between the company and the commissioners acting under the Act 43 Eliz. c. 4, on the basis of the company in future applying £82 16*s.* per annum to the charitable purposes mentioned in the will. This they had done and were willing to do, and they had, moreover, increased this sum up to £300 per annum, while the rents of the property had increased from £167 in 1666 to £1500, and they had also £8645 consols representing part of the property purchased compulsorily. Arrangement with Commissioners.

The information asked for a scheme under the Act 3 & 4 Vict. c. 77, and a declaration that the whole property was devoted to charity, and counsel argued that the Court should first fix a sum sufficient to provide a grammar school as intended by the testator, and then apply it to other instruction under the Act:

Held, that the will vested the property in the company beneficially, subject only to the specific payments mentioned in it; that the company incurred an obligation in 1666 to increase the amounts to £82 16*s.*; that all further augmentations had been bounty on their part; and the Act 3 & 4 Vict. c. 77 did not affect their rights.

Jack (*Principal, &c. of the University of Aberdeen*) v. *Burnett* (12 Cl. & F. 812) (H. L. Aug. 1846, reversing the decision of the Scotch Court). B. in 1648 surrendered to the university of Aberdeen certain lands held of the university by a tenure involving an annual payment of 20 pounds Scots, and certain fines on death and alienation, and the university accepted the surrender. And by the deed of surrender it was expressed that B. had provided three bursars (= scholars) to be educated and maintained at the King's College in Aberdeen according to the manner and at the risk of the bursars then in the college, on condition that they were to be presented by the donor and his successors, lairds of Leys; and if the heads of the college should refuse to admit such nominees, the deed was to become void, and Bursars.

B. and his successors were to be entitled to re-enter upon the land. The land was assured to the heads of the university "to remain with them for the aliment and entertainment of the said three bursars, and according to the provisions and conditions above expressed."

Loss. The university authorities entered into possession of the lands at once. For many years the lands were insufficient for the maintenance of the bursars, but the authorities made up the deficiency out of other funds. The profits of the lands afterwards increased, and the accounts of their profits were kept among the accounts of estates belonging to the university, and the surplus was treated accordingly. The successor of the donor claimed to have the surplus rents applied to increase the allowances to the bursars:

Condition *Held*, that the university was entitled to the surplus, the whole property being given to them on condition they maintained the bursars as bursars were then maintained. *Semble*, the donee takes the surplus when (1) it is granted to him subject to certain payments to others, (2) it is given to him on condition of his making certain payments with a clause of forfeiture on breach of the condition, and (3) if he might be a loser by the insufficiency of the fund.

A.-G. v. *Corporation of Rochester* (5 De G. M. & G. 797) (Feb. 1854, L.JJ. Knight Bruce and Turner). Testator in 1579 devised land for maintaining six permanent inmates in an almshouse at Rochester, and providing relief for six poor travellers, and for the provision of flax, &c., to set the poor of the city at work according to the provisions of the statute 18 Eliz.; and stated that the relief of poor travellers was his principal object. The rents of the land very much increased, and the trustees carried the whole surplus to the account of the poor rate after providing for six almsmen and six poor travellers:

Travellers. Flax.

Held, that the application was wrong, and a scheme must be directed.

The defendants in this case relied on a decree made on an information in 1672, but the judges held that the point now

raised was not then brought before the Court, and that the only question then decided was what parishes were entitled to the benefit of the charity.

Mayor, &c. of Southmolton v. *A.-G.* (5 H. L. C. 1) (May, 1854). H. S. founded a school in Southmolton in 1686 and made his will in 1709, and thereby devised certain hereditaments to the mayor and aldermen of Southmolton on condition they should pay £16 a year for ever to the vicar of N., certain sums for renewing a lease from time to time, £5 15*s.* to certain almshouses, £40 to the school at Southmolton, adding, "And the overplus which the said hereditaments do produce beyond and more than all these disbursements do amount unto (which I do find and compute to be about £60 per annum) shall go the one half thereof always unto him who is and shall be mayor of Southmolton for the time being towards the expenses of mayoralty, and the other half towards the mending of the highways in and near the town of Southmolton." He also incorporated in his will an estimated account containing as a last item: "Balance which the corporation of Southmolton will gain per annum, excepting £13 8*s.* per annum land tax whilst that lasteth, and the poor's rate whereof the tenant by his lease pays the moiety £64 7*s.* 9½*d*;" and a note at the foot of the account saying: "If the taxes to church and poor do not abate somewhat thereof, but the Parliament do use to exempt Windsor and schools and almshouses from taxes; but whatever the balance (*de claro*) proves to be, more or less, the half thereof is given every year to him that shall be Mr. Mayor in being, and the other half towards mending the highways in or near Southmolton, especially between Mole Bridge and the school-house."

In the course of time the income of the property increased from £140 a year to £734 a year, exclusive of the leasehold portion which had been surrendered to the lessors for a sum of £516 instead of being renewed, and since the Municipal Reform Act (5 & 6 Will. 4, 76) the surplus income had been carried to the account of the borough fund. Borough fund.

The information claimed that all the charitable objects should

participate in the increased income, and that the surrender of the leasehold property might be treated as a breach of trust. Curiously enough, the Master of the Rolls, on June 25, 1851, made a decree according to this prayer. But on appeal to the House of Lords this decree was reversed, and it was declared that the information ought to have been dismissed. The judges all held that the corporation took the whole surplus beneficially, and were entitled to surrender a lease renewable by custom but not of right, there being also other land sufficient to answer all the charges on the devised estate. The Municipal Reform Act directed the income of the property of all corporations included in it to be carried to an account called the borough fund (5 & 6 Will. 4, c. 76, s. 92). This Act is now repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

Surrender of lease.

A.-G. v. *Trinity College, Cambridge* (24 Beav. 383) (Feb. 1856, Romilly, M.R.).

Testator in 1558 devised lands to the master, &c. of Trinity College, Cambridge, describing them as "amounting to the clear yearly value of four score pounds or thereabouts," to hold the same "to their only proper use and behoof for evermore," to the intent that they should with part of the rents maintain three grammar schools at U., S., and T., and pay yearly £13 6*s.* 8*d.* to the master of each, and make rules for, *inter alia*, praying for the founder's soul. And he willed that the master, &c., should with part of the rents find a chaplain at D. to say mass twice a week and pray for certain souls, and pay him yearly £13 6*s.* 8*d.* more or less. And he willed that the master, &c., should with part of the rents keep four obits for the testator and bestow yearly at each obit 40*s.*; and he gave yearly for ever to four poor old men to pray for his soul £5 6*s.* 8*d.*, and he gave towards finding of exhibition of one poor scholar within the said college yearly for evermore 40*s.* He gave to A. and his heirs an annual rent-charge of £10, payable out of the lands devised to the college. He desired the master, &c., to let certain lands to A. for fifty years at £20 per annum. He willed that the master, &c., should keep in repair all buildings upon the lands demised,

College.

and pay the sum of £5 6*s.* 8*d.* to the poor men, and that his executors should receive the rents up to the Michaelmas after his death, and that N. S. should have a lease for life of the premises then occupied by him at the existing rent.

The testator died in 1558. The lands were then subject to a charge of £2 13*s.* 4*d.* per annum for the life of T. N., who died soon afterwards. Some litigation ensued, in which the college framed their case on the assumption that by accepting the devise they only incurred a liability for such rents as they received. The land then brought in £83, and the charges upon it, including the annuity to T. N., amounted to £81 6*s.* 8*d.* The rental afterwards greatly increased. The college had increased the stipends to one of the schoolmasters, but claimed all the surplus rental:

Held, that they were so entitled, having regard to the facts that there was a small surplus at the time, and a further expected surplus on the death of T. N. and the expiration of the leases directed by the will. Also on the ground that the college incurred liability to make some payments beyond the rents. The judge also remarked that contemporary acts of the donee had not the same weight attached to them as contemporary acts of the donor, as it was the intention of the latter which governed the disposition of the property. He also pointed out that a charitable corporation stood on a different basis from a trading corporation in these cases, as it was consistent with a charitable intention on the part of the testator to allow the charitable corporation to take the surplus profits of the land.

Acts of donee.

It is clear that in this case the Crown might have claimed a portion of the profits of the land under the statute of 1 Edw. 6, relating to superstitious uses. In the absence of any claim it may be assumed that the rights of the Crown had been arranged for.

A.-G. v. *Mayor, &c. of Beverley* (15 Beav. 540) (1853) (M.R.); affirmed on appeal, 6 De G. M. & G. 256 (Jan. 1855, L.JJ. Knight Bruce and Turner, but finally reversed by the

H. L.); *Mayor of Beverley, &c.* v. *A.-G.* (6 H. L. C. 310) (July, 1857).

Testator by will made in 1652, after mentioning that he had bought a farm called Silliards which brought in £47 per annum, gave it to the Mayor, &c., of Beverley on trust to pay £10 per annum to the preacher of the town, and £10 to the schoolmaster, and £20 to his sister for life, and after her death to pay three sums of £6 13*s.* 4*d.* each to sending to Cambridge three poor scholars of the school, and in default of such scholars, what could be "spared of the said £20 (no poor scholar having above £6 13*s.* 4*d.* yearly) shall be distributed among the poorest people of the said town. Moreover, so long as the taxes for the maintenance of soldiers shall continue, what the mayor, aldermen and burgesses cannot spare out of the overplus of rent, viz. £7, shall be deducted equally out of the gifts to the lecturer and schoolmaster, so that my sister may have £20 yearly clear." There was a further gift of £450 to the mayor, &c., to buy land yielding £22 10*s.* per annum, on trust to distribute £20 per annum of the rent among the poorest people of the town, and so long as the taxes for soldiers should continue, then, unless they could spare anything out of the 50*s.* overplus, the same should be defrayed out of the £20 yearly. After the date of the will, the testator himself bought land to satisfy the last-mentioned gift of £450, and made a codicil giving the land to the trusts mentioned in the will:

Gift held residuary.

Held, that the testator intended the corporation to take both properties beneficially, subject to payment of the specified sums for the charitable purposes mentioned in the will. The judges considered that the gift of the overplus was residuary, liable to abate first if the income fell, and carrying all increase of income with it.

A.-G. v. *Dean and Canons of Windsor* (8 H. L. C. 369) (May, 1860, H. L. affirming M.R., Jan. 1858) (24 Beav. 679).

Henry VIII. had promised certain benefits to the dean and canons of Windsor and to an ancient order of poor knights there, and gave directions by his will for fulfilling his promise,

but such directions had no binding effect. Edward VI. then conveyed lands to the dean and canons subject to a covenant on their part to bestow the rents to the extent of £600 per annum in such manner as the king and the other executors of the will of Henry VIII. should appoint. No such appointment was ever made, and it was here held that there was a resulting trust for the Crown. Queen Elizabeth afterwards executed a deed directing certain yearly sums to be paid to the poor knights, amounting to £430 19*s.* 6*d.* in all, enumerating the lands appointed for these charges as having a total rental of £661 6*s.* 8*d.* per annum, and adding, "which said lands and other the premises amounting to the said sum of £661 6*s.* 8*d.* we will and ordain and by these presents declare shall remain to the said dean and canons and to their successors for ever, that is to say, for the maintenance of the charges of £430 before declared, and the residue being £231 6*s.* 8*d.* to remain for the vicars, and serving priests' wages, when need requireth, reparation of the said lands, the officers' fees, and for the relief of the said dean and canons and their successors."

Poor knights of Windsor.

In the course of time the income produced by the lands increased to some £15,000 a year. The poor knights claimed to be entitled to an increase of their allowances:

Held, that the dean and canons were entitled to the whole of the residue after satisfying the fixed charges directed to be paid to the poor knights by Queen Elizabeth.

In re Ashton's Charity (27 Beav. 115) (March, 1859, M.R.).

A charity was created for six almswomen, and the residue of the rents was directed to be paid to them. The residue increased very much, and the increase was directed to be applied to found a school.

A.-G. v. *Jesus College, Oxon* (29 Beav. 163) (Feb. 1861, Romilly, M.R.).

Testator recited an intention to benefit Jesus College, and devised all his estate to provide £108 per annum for scholars and exhibitioners there, and the residue to purchase advowsons for them. By a codicil he gave a tenement at Bala, and a plot

of land then let at £3 12*s.* per annum, to found a school there, and gave £15 per annum to the master, and £15 per annum to clothe thirty scholars, and so much as was necessary for the repairs of the school; and then mentioned that the rents of his estates in Merionethshire exceeded by £4 17*s.* the sum of the £108, £15, and £15, but as the £3 12*s.* was included therein, it left £1 5*s.* for the repairs of the school.

The estates increased in value, and the increase had from time to time been applied in increasing the gifts to the several objects. There was still a surplus, and these proceedings were taken to settle its disposition. The school claimed the whole:

Held, that the school was only entitled to such a proportion of the nett improved rents as £4 17*s.*—the amount originally allotted to it over the fixed payments—bore to £142 17*s.*, the original rental.

A.-G. v. *Marchant* (L. R. 3 Eq. 424) (Nov. 1866, V.-C. Kindersley).

A testator devised land in 1640 on trust to pay £20 a year to a schoolmaster at H., and £20 to Trinity College, Oxford, for books and repairs of the library, and £5 and £5 for the poor of two parishes, and directed any deficiency to fall rateably on all his objects. The land now brought in £82 per annum, and the trustees had some accumulations in hand. The original rental of the property was not known.

Proviso for loss.

The Court directed the accretions to be applied as to one moiety to the school, and the other moiety to the college, observing that gifts to the poor were detrimental to a parish; and in such a case the Court should exercise its discretion and depart from the rule of applying an increase rateably amongst all objects.

Gifts to poor not favoured.

A.-G. v. *Mercers' Company* (W. N. 1870, 58) (V.-C. James). Dean Colet founded St. Paul's School and vested property in the Mercers' Company on trust to keep it up. His ordinances provided that, after taking an account every year, the overplus of money, after paying all ordinary charges, was given wholly to the company to the maintaining and supporting and repairing

all that belonged to the school from time to time; nevertheless so much of the surplus as should be spared above reparations and casualties was to be kept in a chest in the company's hall, and remain apart by itself, that it might appear how the school by its own self maintained itself. The books of the company contained some evidence of an arrangement with Dean Colet, to the effect that the company should have lands worth 44 marks (£14 13*s.* 4*d.*) per annum for their trouble in managing the school, but no such lands had been conveyed to them. As a matter of fact, the school had enjoyed the whole income of the property down to 1860, when the company set up that they were beneficial owners of the property subject to the duty of keeping the school in an efficient state, and argued that there must have been a further arrangement giving them something in place of the 44 marks per annum:

Held, that the whole property was affected by a trust for the school, and an inquiry directed whether an application should be made to the Committee of the Council of Education, or the Commissioners under the Endowed Schools Acts, or to Parliament.

Merchant Taylors' Company v. *A.-G.* (L. R. 11 Eq. 35) (November, 1870, Romilly, M.R.); (L. R. 6 Ch. 512) (March, 1871, Lord Hatherley, and James and Mellish, L.JJ.). Testator by will made in 1570 devised tenements in London to the company, "to this intent and upon this condition," that they should yearly out of the rents and profits provide for each of twelve poor men of the City, a gown of 7 yards of Welsh frieze at 16*d.* a yard, a shirt of the value of 2*s.*, and a pair of shoes at 12*d.* the pair; and for each of twelve poor women a cassock of 5½ yards of like frieze, a smock of 20*d.*, and a pair of shoes of 12*d.* the pair; the gowns and cassocks to be ready made. The chamberlain and town clerk of the City were to have each 10*s.* a year out of the rents for seeing to this; and the will continued: "And so that the whole residue of the said rents and profits of the said lands, tenements and gardens, they do maintain and gather yearly into an whole stock and therewith do keep the

Condition.

Residue for repairs.

reparations of the said tenements to them devised, and if need be new build the same as to their discretions need shall appear, as the same stock will fall out." And if the company were remiss and negligent in delivering the gowns, &c., he willed that the parson, churchwardens, and parishioners of St. M. should enter upon the tenements devised to the company and hold the same, "to this intent and upon this condition, that they should bestow the yearly rents and profits on the gowns, &c., and the reparations of the same tenements and gardens, and the 20*s.* to the chamberlain and town clerk, putting the churchwardens and parishioners in mind of the conditions before expressed."

Gift over.

The testator died soon after the date of his will. The rents of the property were £24 18*s.* immediately after the testator's death, and the payments in respect of the charges were £15 7*s.* The rents always shewed a surplus over the sum required to meet the charges and keep the tenements in repair. From the death of the testator until Christmas, 1862, the company believed they were entitled to the surplus rents, and carried the same to their corporate account. In the beginning of 1863, however, the Charity Commissioners suggested that the surplus rents were applicable for charitable purposes, and since that time the plaintiffs had accounted for them accordingly to the Charity Commissioners. In 1869, however, Lord Romilly held that the Wax Chandlers' Company were entitled to the surplus rents of an estate devised to them by a very similar will, and this decision was affirmed on appeal. Thereupon the Merchant Taylors' Company filed the present bill for a declaration that they were entitled to the surplus rents in the present case. At the same time the Wax Chandlers' Case was under appeal to the House of Lords, and it would seem that all the judges who decided it below had repented of their decision, for they managed to distinguish the present case from it, and to hold that the surplus rental was applicable for charitable purposes. The Wax Chandlers' Case was soon afterwards reversed by the House of Lords, and is the case next noticed.

A.-G. v. *Wax Chandlers' Company* (L. R. 8 Eq. 452) (August, 1869, Lord Romilly, M.R.); (5 Ch. 503) (March, 1870, L. C. Hatherley, affirming Lord Romilly); (6 H. L. 1) (February, 1873, LL. Chelmsford, Colonsay, and Cairns, reversing both prior decisions). Testator in 1558 left houses after his son's death to the defendant company, "for this intent and purpose and upon this condition," that they should yearly distribute £8 to the poor inhabitants of the parishes of M. and B. and the poor men and women of the company, allowing 2*s.* to the churchwardens of each parish out of the money, and 5*s.* to the master and wardens of the company, and the rest of the profits of the houses should be bestowed on repairing them. And if the company should leave any of the things above rehearsed undone, he willed that his next of kindred should enter upon the houses and hold them upon condition they did the things above rehearsed.

Condition.

Rest for repairs.

Gift over.

At the testator's death the houses brought in about £9 4*s.* per annum; when the property devolved on the company the rent had risen to £16 per annum, and now it was £330 per annum:

Held, that it was a gift in trust, and not upon condition in the legal sense, and that the whole was devoted to charity. The Court, however, refused to make the company account for the back rents, and declared them entitled to some land mixed up with the devised land, which the Attorney-General claimed as having been bought out of the surplus rents. An account was taken of the rents from the date of the filing of the information.

CHAPTER XXIII.

On Foreign Charities.

As to consent of foreign Government.

The effect of gifts for the fulfilment of charitable objects in foreign countries does not appear to have received the consideration which it deserves. The earliest cases, which called for decision on this point, appear to have been gifts for the fulfilment of charitable purposes in other portions of the dominions of the British Crown. In such cases the presence of the Attorney-General, as representing the Crown, gave notice to the Crown of all the proceedings, and it was thus possible for the Crown to raise any objection to the proposed object, or to give directions to the proper officials in the other dominions to see to the application of the property after its transfer to the hands of persons residing out of the jurisdiction of the English Courts. But in the case of persons residing in countries politically as well as legally independent, very different considerations arise. There is nothing to inform the officers of the Government that such and such property has been handed to such and such a person, for such and such a purpose. Moreover, in the case of gifts for the purpose of establishing a new charitable foundation, it would seem to be right to ask expressly for the consent of the Government of the country. This has never been done, but the Court has only inquired whether the proposed object could be lawfully effected in the country named, and it has required to be satisfied that it would probably be carried out (*Mayor of Lyons* v. *East India Company* (1836) (1 Moore, P. C. 175)). Nevertheless, the case of *New* v. *Bonaker* (1867) (L. R. 4 Eq. 655), appears to shew that the consent of the Government should be asked, and that its refusal is fatal to the gift. That

was a case of a gift to trustees in the United States for establishing a new charity in Pennsylvania. The trustees declined to act. Now it is a well-known principle that a trust shall not fail for default of a trustee, and we have seen this principle applied to charitable trusts in many cases, and it will be found applied to foreign charities in the case of *A.-G.* v. *Stephens* (1834) (3 My. & K. 347). Nevertheless, in *New* v. *Bonaker* it was held that the trust failed on the refusal of the trustees to act. We conceive that the real ground on which this decision can be supported is that the trustees named in the will were the President and Vice-President of the United States, and the Governor of Pennsylvania; and that their refusal was equivalent to a refusal of consent by the Government of the country named by the testator.

We can now state the main principles which have been established with regard to foreign charities.

Gift tested by English law and foreign law.

It seems that the first subject of consideration is whether the proposed object would be a good charity in England; and if it is not so the gift is void (*De Garcia* v. *Lawson* (1798) (4 Ves. 433, n.); *Habershon* v. *Vardon* (1851) (4 De G. & Sm. 467)).

If the proposed charitable gift is good by English law (*President of U. S.* v. *Drummond* (cit. 7 H. L. 141, 155); *In re Michel's Trust* (1860) (28 Beav. 39)), it may be carried out, and the next point to be considered is, whether it is good by the law of the country in which it is to be applied. It appears to be usual to direct an inquiry on this point, and an inquiry also as to the best means of effecting the testator's object (*Thompson* v. *Thompson* (1844) (1 Coll. 381); *Mayor of Lyons* v. *East India Company* (1836) (1 Moore, P. C. 175); *A.-G.* v. *Sturge* (1854) (19 Beav. 597)). Even in the case of a gift to an existing charitable corporation in a foreign country, the Court has inquired whether it could hand the fund to some Court there to be administered, and eventually paid the money to the officials of the corporation on an undertaking by them to apply it properly (*A.-G.* v. *Fraunces* (1866) (W. N. 280)); but in other cases it has paid over money more readily (*Minet* v. *Vulliamy*, before

To whom payment made.

1826 (1 Russ. 113, n.); *Emery* v. *Hill* (1826) (1 Russ. 112)); and it has ordered money to be paid to the Commissioners of Charitable Gifts in Ireland (*Collyer* v. *Burnet* (1829) (Tamlyn, 79)), and to an English corporation carrying on operations abroad (*Society for the Propagation of the Gospel in Foreign Parts* v. *A.-G.* (1826) (3 Russ. 142)), or to a trustee with a declaration of the trusts affecting it (*Provost, &c. of Edinburgh* v. *Aubery* (1753) (Amb. 236); *Martin* v. *Paxton* (1824) (cit. 1 Russ. 115)).

Trustees appointed.

The Court may appoint any person, wherever resident, to be trustee of property within its jurisdiction devoted to a foreign charity (*A.-G.* v. *Stephens* (1834) (3 My. & K. 347); *Mayor of Lyons* v. *East India Company* (1836) (1 Moore, P. C. 175); *Thompson* v. *Thompson* (1844) (1 Coll. 381)); but the consent of the Charity Commissioners is necessary to a petition for such a purpose (*In re Duncan* (1867) (L. R. 2 Ch. 356)).

No scheme for administration.

The Courts in England will not settle a scheme for the administration of a charity in another country (*A.-G.* v. *Lepine* (1818) (2 Swan. 181)); but in the case of a gift for a charity in another part of the British Empire, the English Courts will direct the parties before them to apply for a scheme in the local Court and decide who shall be entitled to make the application (*Forbes* v. *Forbes* (1854) (18 Beav. 552); *Yeates* v. *Fraser* (1883) (22 Ch. D. 827)).

But scheme for managing property in England.

The English Courts, however, may settle a scheme for the management of property in England devoted to charitable objects abroad, up to directing payment of the money into the hands of the foreign administrators, and requiring accounts, and may from time to time alter such scheme (*A.-G.* v. *College of William and Mary and Mayor of London* (1790) (2 Swan. 180); *A.-G.* v. *Sturge* (1854) (19 Beav. 597)).

Delay in applying fund.

If the object intended by the donor cannot be carried out at once, the Court may retain the money for a reasonable time, to see if it can be carried out (*A.-G.* v. *Bishop of Chester* (1785) (1 Bro. C. C. 444); *Society for Propagating the Gospel in Foreign Parts* v. *A.-G.* (1826) (3 Russ. 142)). And if it cannot be

effected after a reasonable interval, the Court may declare the gift to have failed (see *Mayor of Lyons* v. *East India Company* (1836) (1 Moore, P. C. 175), and compare the cases last cited).

Refusal of trustees.

In general a foreign charitable trust does not fail for default of its trustees (*A.-G.* v. *Stephens* (1834) (3 My. & K. 347)); but if the trustees are the heads of the Government of the foreign country, their refusal destroys the trust (*New* v. *Bonaker* (1867) (L. R. 4 Eq. 655)).

Alteration of scheme.

When a foreign charity takes a share of a fund under a scheme, the rest of the scheme may be altered as circumstances require it, without citing the administrators of the foreign charity (*Mayor of Lyons* v. *Advocate-General of Bengal* (1876) (1 App. Cas. 91)).

The Georgian Mortmain Act will be discussed at greater length in a later part of this work, but at present the following points may be stated:—

Georgian Mortmain Act confined to England and Wales.

Land out of England is not within the Georgian Mortmain Act, and therefore there is no objection to a direction to invest charitable funds in land out of England (*Campbell* v. *Earl of Radnor* (1783) (1 Bro. C. C. 271); *Oliphant* v. *Hendrie* (1784) (1 Bro. C. C. 571); *Mackintosh* v. *Townsend* (1809) (16 Ves. 330)). And a general direction to invest in land may be held to include land out of England, and so to be good (*Provost of Edinburgh* v. *Aubery* (1753) (Amb. 236)); but if it appears on the whole will to mean land in England, it is void, although the rents are to be applied in charity out of England (*A.-G.* v. *Mill* (1827) (3 Russ. 328)). And a direction to buy land in England or Ireland for charitable purposes is good as to Ireland (*University of London* v. *Yarrow* (1857) (1 De G. & J. 72)). And land in England cannot be devoted by will to foreign charities (*Curtis* v. *Hutton* (1808) (14 Ves. 537)).

As the Georgian Mortmain Act only applies to England and Wales, it does not avoid a devise of land elsewhere for charitable purposes (*A.-G.* v. *Stewart* (1817) (2 Mer. 143), a case of land in the island of Grenada; *Whicker* v. *Hume* (1858) (7 H. L. C. 124), a case of land in New South Wales); but as land every-

where devolves according to the law of the country in which it is situated, it becomes necessary to inquire what that law is, whenever the Courts in England are called upon to decide on the validity of a devise of land for any purpose.

Cases.

The following are the cases on foreign charities :—

Provost, Bailiffs, &c. of Edinburgh v. *Aubery* (Amb. 236) (1753, Lord Hardwicke). Bequest of £3500 South Sea Annuities to the plaintiffs, to be applied to the maintenance of poor labourers residing in Edinburgh and towns adjacent, with power to invest the same in other funds or land.

Lord Hardwicke was of opinion he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is to some of the Courts in Scotland; and therefore directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will.

The decree declared the trusts good, except as to any power to lay the money out in lands in England, ordered the stock to be transferred, and declared the same after transfer to be subject to the charitable trusts directed by the testator.

Campbell v. *Earl of Radnor* (1 Bro. C. C. 271) (1783, Lords Commissioners). Bequest of £7000 to be laid out after the death of the testator's wife in the purchase of lands in Ireland, the rents and profits to be distributed among poor persons in Ireland who should appear to be related to the testator (though ever so remotely), or in default of poor relations of his to poor persons in the county of Antrim in Ireland; and the testator made his wife residuary legatee and sole executrix. She proved his will, and by her will recited that her husband's personal estate was out on mortgage, and directed land of her own to be sold to pay the £7000 :

Poor relations.

Held, that the wife's will was an admission that she had received assets of her husband's property applicable to pay the £7000, and she was therefore devising land to pay a debt, and the gift was good. It was too late to object that the original testator did not leave pure personalty enough to pay the £7000;

Legacy turned into a debt from executrix.

and the direction to purchase land in Ireland was good. The purpose was assumed to be a good charity.

Oliphant v. *Hendrie* (1 Bro. C. C. 571) (May, 1784, L. C. Thurlow). Bequest of £1400 to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest thereof to be applied towards the education of twelve poor children and towards increasing the allowance of the schoolmaster of the parish:

Held, a good bequest, and not affected by the Georgian Mortmain Act.

A.-G. v. *Bishop of Chester* (1 Bro. C. C. 444) (May 7, 1785, L. C. Thurlow). Testator gave £1000 3 per cent. Annuities to the defendant and Dr. S. for the purpose of establishing a bishop in His Majesty's dominions in America, and £1000 to be laid out upon repairing parsonage houses (to be chosen by the defendant and Dr. S.), and ordered that if any charity to which he had given a legacy should no longer subsist (or be grossly perverted) at his death, such legacy should fall into the residue:

Held, that the first £1000 must remain in Court till it should be seen whether any such appointment should take place. With respect to the selection of objects for the other legacy it must be referred to the Master, and proposals of proper objects must be laid before him. Retention of fund.

A.-G. v. *College of William and Mary and the Mayor of London* (2 Swan. 180) (3 Bro. C. C. 171, also in part 1 Ves. Jun. 243), (Nov. 1790, L. C. Thurlow). Testator by will made in 1691 directed that the residue of his personal estate should be disposed of by his executors for such charitable and pious uses as they in their discretion should think fit, but recommended them to lay out the greater part thereof for the advancement of the Christian religion.

A scheme for the application of the property was settled by the Court of Chancery directing certain payments to—(1) the corporation for propagating the Gospel in New England to be applied for the salary of two ministers to instruct the natives in or near His Majesty's colonies in New England in the

Christian religion; (2) to Harvard College in New England; and (3) to pay the surplus to the College of William and Mary in Virginia. The scheme contained directions for the application of the two last-mentioned gifts. Corporation (1) was localized in England, (2) and (3) in the colonies which became independent.

The Lord Chancellor considered that the trusts of (1) ceased for want of objects, there being no longer any neighbouring infidels, and that after the recognition of the independence of the United States, he could no longer regard (2) and (3) as corporations; and a new scheme must be settled for the charity.

Scheme altered.

It was stated in argument that the treaty of peace preserved every right of every corporation as it was before.

In the course of the argument the Lord Chancellor threw out as a reason for discontinuing the payments to the American corporations, that there was no means of calling them to account in this country if they misapplied the funds.

There appeared to be objects of the charities for which the payments to the American corporations were made, and the College of William and Mary stated that they had incurred expenses relying on the continuance of the allowance to them.

De Garcia v. *Lawson* (4 Ves. 433, n.) (July, 1798). Some legacies to Roman Catholic religious orders in France were held void. See the chapter on Gifts to Religious Orders, p. 61.

Curtis v. *Hutton* (14 Ves. 537) (March, 1808, Sir W. Grant, M.R.). Testator devised his real estate to his executors to sell and apply the proceeds, and also his personal estate, in paying his debts, &c., and invest the residue in the purchase of freehold lands and tenements in Great Britain or in the public funds or in other proper securities in Great Britain at interest, and apply the income in an establishment for students in the King's College of Old Aberdeen in North Britain, and in a further payment not exceeding £80 per annum to the general use of the college, and any surplus to be employed by the trustees at their discretion for the promoting of learning in any of the seminaries of Great Britain or Ireland:

Held, that the object was charitable; that it was void as to the real estate, but good as to pure personal estate, which might under the alternative trust be properly invested; the debts, &c., to be paid rateably out of both funds. Foreign charities were held to be within the Georgian Mortmain Act.

Mackintosh v. *Townsend* (16 Ves. 330) (June, 1809, L. C. Eldon). In this case the testator, who was a sea captain, made a will and several codicils at sea and one codicil in London. His domicile is not mentioned, but his estate was administered in England. By his will and codicils he left £10,000 to be laid out in lands in Scotland, the income of which was to be devoted to the education of boys, with a direction that the boys should be selected from certain named families. It was not argued that this did not constitute a charitable purpose, but it was objected that personalty locally situated in England at the testator's death could not be bequeathed to be invested in land in Scotland for a charitable purpose:

Education of boys of certain families.

Held, that it could be so bequeathed.

A.-G. v. *Lepine* (16 Ves. 330) (Feb. 1815, M.R. Sir W. Grant; on appeal (2 Swan, 181), June, 1818, L. C. Eldon). A. directed a moiety of his residuary personal estate to be invested in the funds, and gave the income thereof to the minister and churchwardens of the parish of Dollar, in Clackmannan, in Scotland, for the time being for the benefit of a charity or school for the poor of the said parish.

An objection was taken that the Court could not administer a charity out of its jurisdiction; but this objection was abandoned after argument, and a decree made by the Master of the Rolls directing a scheme to be settled for the administration of the bequest.

The Attorney-General appealed from the decree so far as it directed a scheme, and the Lord Chancellor ordered the dividends to be paid to the minister and church officers of the parish of Dollar for the time being, saying that the Court did not take into its hands the administration of charities in Scotland, and

No scheme.

that the Scotch Courts would have to determine what kind of school or charity should be established.

An unreported case of *Cadell* v. *Grant*, in Chancery (April, 1795), is mentioned in this case as a precedent of a decree by the Lord Chancellor establishing a charity in Scotland.

Martin v. *Paxton* (cit. 1 Russ. 115) (Feb. 1824, L. C.). A fund bequeathed to a charity at Lyons ordered to be paid to two of the plaintiffs, as attorneys of their co-plaintiff, the Mayor of Lyons, under a power of attorney authorizing them to receive the money.

Minet v. *Vulliamy* (1 Russ. 113, n.) (cited in the next case in 1826). Bequest of the yearly income of £190 sterling (part of a sum of £245 long annuities) to the chamber of the charity of Chaux de Fonds in the community of Valengin, in Switzerland, for the maintenance and relief of the poor of the said community.

It was found on inquiry that the chamber of the charity of Chaux de Fonds was a body corporate, regularly instituted for collecting and administering charitable gifts. The officers of the corporate body executed a power of attorney to two delegates to apply for the bequest and receive it.

Capital paid over.

An order was made directing the £190 long annuities and the arrears of the same to be paid to the attorneys so appointed by the corporation.

Emery v. *Hill* (1 Russ. 112) (Feb. 1826, M. R. Gifford). Bequest: "I give and bequeath to my executors in England £20,000 sterling in trust to invest the same in 'Reduced Annuities,' which said stock I give to the treasurer for the time being of a society in Scotland for propagating Christian knowledge, to apply the dividends in equal portions for the purposes of the first and second patent. And I will and order that no part of the said legacy be at any time laid out or employed for the purpose of building, or in repairs, or ornaments, but that the same be wholly and solely applied for the charitable and pious uses and purposes of the said society."

The society had been incorporated by letters patent of Queen

Anne and George II. The legacy had been invested in the funds mentioned on account of the Accountant-General. On petition by the society and their treasurer:

Held, that the stock should be transferred to the society, and any dividends thereon should be paid to their treasurer.

Society for Propagation of Gospel in Foreign Parts v. *A.-G.* (3 Russ. 142) (Dec. 1826, M.R.). A testator gave £1000 to the plaintiff society for the settlement of two bishops, one on the continent, the other in the islands of North America, the same not to be paid until such bishops were lawfully appointed, but in the meantime to be invested, and the income paid to invalided missionaries of the society. Eventually such bishops were appointed, and in the meantime the fund had been set apart and accumulated up to £9410 Consols, £750 Reduced Annuities, and a large sum of cash.

The whole was ordered to be paid to the society without any scheme, on the ground that the testator had reposed confidence in the society. No scheme.

A.-G. v. *Mill* (3 Russ. 328) (May, 1827, Lord Lyndhurst). A testator, who was a Scotchman, made a will in England in English form, and soon afterwards took up his residence in England. By the will he directed personalty to be laid out in land, and the income to be paid to the trustees of a deed executed by him. The trusts of the deed were for the relief of poor ladies at Montrose, in Scotland, and the deed provided that the trustees thereof should be persons residing within twenty miles of Montrose.

It was held that the natural meaning of the will was to direct the purchase of land in England alone, and that the gift was void on that account. The Lord Chancellor said: "If it was the intention of the testator to give the trustees power to lay out the residue of his personal estate in the purchase of lands either in Scotland or England, the gift to charity will be good." (See *University of London* v. *Yarrow* (23 Beav. 159) (1 De G. & J. 72).) An appeal was taken to the House of Lords in *A.-G.* v. *Mill*, but it was affirmed, judgment being again given by Lord

Lyndhurst (*A.-G.* v. *Mill* (Oct. 1831) (5 Bligh, N. S. 593; 2 D. & Cl. 393)).

Collyer v. *Burnett* (Tamlyn, 79) (July, 1829, Leach, M.R.). Bequest of £9000 stock and a sum of long annuities to the rector and parishioners of the parish of L., in Ireland, apparently for some charitable purpose.

The Master of the Rolls ordered the stock and annuities to be sold, and the proceeds to be paid to the Commissioners of Charitable Funds in Ireland appointed under the Act 40 Geo. 3, c. 75. Evidence was given that this bequest came within the jurisdiction of the commissioners.

A.-G. v. *Stephens* (3 My. & K. 347) (Apr. 1834, Leach, M.R.). An order was made appointing a new trustee of a charity to be established at Lisbon. This case will be found stated more fully in the chapter on Defunct Societies, p. 228.

Mayor of Lyons v. *East India Company* (1 Moore, P. C. 175) (Dec. 1836). This was an appeal from the Supreme Court of Bengal. One of the points involved in the appeal depended on the effect of a direction by will by a Frenchman residing in India, that his executors should apply property in Bengal for the purpose of converting into a college a house at Lucknow, which was then in the dominions of the King of Oude. The King of Oude was nominally independent, but much under British influence, and the Court at Calcutta had jurisdiction over British subjects within his dominions. The king neither forbade nor encouraged the establishment of the college.

New charity.

Lord Brougham, in giving judgment, observed that the Master had been directed to inquire whether the Governor-General of India had the means of giving effect to the bequest and was willing to receive the fund, and reported that he was willing to receive the fund, and referred to some correspondence as to his means, and the Court on this finding had ordered the fund to be paid to the Governor-General. Lord Brougham then said: "We do not think that this part of the decree can stand. The Court must have an answer to the inquiry, and a reasonable ground for assuming that the bequest can be carried into effect before it

Fund not paid to Governor-General of India.

can part with the fund. But the manner in which it is proposed to part with the fund is also, in our opinion, improper. The Court gives the control of it, not to any party or any competent authority pointed out by the testator, as was done in the case of the *Provost, &c. of Edinburgh* v. *Aubrey* (Amb. 236) and *Oliphant* v. *Hendrie* (1 Bro. C. C. 571) and the other cases of this class. Nor does it give the control and management to any person under its own superintendence and amenable to its jurisdiction. Giving it to the Government is letting go all hold over it, and at once departing with its jurisdiction to those who can never in any way be interfered with or called to account. It appears clear that if the Court had been satisfied of the means existing for effecting the testator's purpose at Lucknow, there should have been appointed a trustee or trustees for applying the fund under the superintendence of the Court, and that these trustees should, therefore, have been persons residing within its jurisdiction; and if officers of its own, so much the better . . . .

"Then for the part reversed, there must be substituted a direction that further inquiry be made as to the power of the Governor-General to aid trustees to be appointed by the Court in giving effect to the bequest regarding the college; and if the Court shall be satisfied that in this or in any other way such trustees can give it effect, then the fund is to be paid over to such trustees, who are to report from time to time to the Master, and to administer the fund under the superintendence of the Court, the Court giving such directions as may be necessary to establish the charity according to the will. Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in this country. But in one respect there is sufficient authority, viz. as far as regards a postponement of distribution, and the not declaring the gift void on account of any present difficulty in giving it effect. The case of *A.-G.* v. *Bishop of Chester* (1 Bro. C. C. 444) furnishes a direct authority for not declaring a legacy void because it was for an object which could not at the time be accomplished, and

for retaining the fund in Court until it should be possible to apply it. No doubt, if in that case some years had elapsed and no prospect appeared of an episcopal establishment in Canada, the Court would then have declared the legacy void, and distributed the fund to the parties entitled. So here, if it shall be found, either at first that there can be no application of the fund in the manner directed by the will, or that the trustees, after making the attempt, fail in it, the Court will then direct the same application to be made of it which they would have done had the bequest been at first declared void.

"Where there exists a party entitled to receive a fund bequeathed for a foreign charity, there can be no objection made to giving over that fund to him, and allowing him to administer it in the country in which the charity is to be established; this has been repeatedly done, both where the party was within the jurisdiction of the Court, and where it was beyond it, as *Minet* v. *Vulliamy* (1 Russ. 113, n.) (Switzerland), *Martin* v. *Paxton* (cit. 1 Russ. 115) (Lyons), and *Emery* v. *Hill* (1 Russ. 112), which followed the former precedents.

"The Court has gone farther of late years than Lord Hardwicke thought he could in *Provost of Edinburgh* v. *Aubrey* (Amb. 236), for he then held that he could give no directions as to the distribution. But in *Cadel* v. *Grant* (1795) (unreported), *Oliphant* v. *Hendrie* (1 Bro. C. C. 571), and *A.-G.* v. *Lepine* (16 Ves. 330), the Court interfered with the application of the fund, directing a scheme to carry the charity into execution. In the latter case the objection was taken to the jurisdiction, on the ground that the charity was to be executed in Scotland; but it was abandoned, and the decree affirmed, on the rehearing. In a subsequent stage of the same cause the objection appears to have been renewed with effect; for there is a report of a rehearing of the former decree, when Lord Eldon reversed so much of it as directed the scheme approved by the Master to be carried into execution."

His Lordship then commented on *A.-G.* v. *The Mayor of London* (2 Swan. 180) (3 Bro. C. C. 171) (1 Ves. Jun. 234) and

A.-G. v. *Stephens* (3 My. & K. 347) as warranting the course taken, and added that its complete justification must be sought in the peculiar circumstances of the case, Oude being not altogether a foreign and independent state, but under the influence of the Government of India, who might find fit persons, possibly officials, to administer the trust.

The costs of all parties as between solicitor and client were allowed out of the general estate.

The President of the U. S. v. *Drummond* (May, 1838) (cit. 7 H. L. 141, 155).

Lord Langdale, M.R., decided that a gift to the United States of America to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase of knowledge among men, was a valid charity.

A case of *Cockburn* v. *Raphael*, before the Lord Chancellor, May 9, 1842, is referred to in several cases, and it is stated to be a decision on a gift of £40,000 to a charity at Trieste.

Thompson v. *Thompson* (1 Coll. 381) (Aug. 6, 1844, V.-C. Knight Bruce).

Testator, a native of D. in Scotland, but residing in England, made a will directing certain charities to be established in Scotland, including the distribution of bread at D., giving an annuity to a poor literary man, and giving prizes for essays.

An inquiry was directed whether the gifts could be carried into effect by the law of Scotland, and whether the testator's intention would be best carried into effect by appointing trustees in Scotland.

Mitford v. *Reynolds* (1 Phil. 185) (1841–2, L. C. Lyndhurst); (16 Sim. 105) (Feb. 1848, V.-C. Shadwell).

Testator gave the residue of his property "to the Government of Bengal for the express purpose of that Government applying the amount to charitable beneficial and public works at and in the city of Dacca in Bengal, the intent of such bequest and direction being that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the Government may regard to be most conducive to that end."

The Court directed an inquiry who was meant by the Government of Bengal, and the master found that the testator intended to designate the executive Government of Fort William in Bengal, as it existed under Act 3 & 4 Will. 4, c. 85, and that such Government was vested in the Governor-General of India, who, however, in administering a trust of this nature, would be amenable to the control of the Supreme Court of Calcutta. The Governor-General was then made a party to the suit, and the Court pronounced the gift valid. Eventually the fund was ordered to be paid to the Governor-General for the charitable purposes expressed in the bequest.

Fund paid to Governor-General of India.

The Georgian Mortmain Act is only once mentioned in the report, namely in a sentence in the judgment (p. 192), where the Lord Chancellor says that it is unnecessary to advert to it, because it does not apply to India. It is probable, therefore, that the testator owned land in India, but neither land nor impure personalty in England.

Habershon v. *Vardon* (4 De G. & Sm. 467) (May, 1851, V.-C. Knight Bruce).

A gift to be applied towards the political restoration of the Jews to Jerusalem and Palestine, was held void. See this case more fully stated in the chapter on Political Gifts, p. 177.

A.-G. v. *Sturge* (19 Beav. 597) (Feb. 1854, Romilly, M.R.).

A testatrix had established a school in Genoa. By her will she gave an immediate legacy to the Rev. J., consular chaplain at Genoa, for the use of the school, and she desired that if the school should exist at the time of the death of her aunt, £1000 should be then paid to the said Rev. J., consular chaplain at Genoa, for the maintenance and support of the said school under the direction and care of the said Rev. J., to be disposed of as he might think fit.

The Rev. J. died before the testator's aunt, but the school was still maintained.

The Master of the Rolls directed a reference to chambers to consider how and to whom the legacy should be paid and applied, having regard to the law of Genoa, so as best to carry

into effect the intention of the testatrix. Under this reference a scheme was approved directing the legacy to be invested and the dividends to be paid to the consular chaplain for the time being at Genoa, to be applied by him for the support of the school, and that he should every two years send an account of the same to the Court and the Attorney-General, signed by himself and certified by the British Consul at Genoa.

Mode of accounting.

Forbes v. *Forbes* (18 Beav. 552) (March, 1854, Romilly, M.R.).

A testator, apparently domiciled in Scotland, bequeathed thus: "I leave £2000 to my executors in trust for the purpose of building a bridge over the river D. in Strathdon, the situation to be chosen by them."

He died in 1821. His executors set apart £2000 and accumulated it, and themselves died without selecting any situation for the bridge.

The Master of the Rolls thought that there was something more precise in this case than in that of *A.-G.* v. *Sturge*, and that the better course would be to have the money paid into Court, and then to make an application to the Court of Session in Scotland to decide as to the disposition of the fund and the regulation of the charity, and afterwards to apply to this Court. He had little doubt that the accumulations went with the original bequest; and that the power of selection was personal, and no longer existed.

Power of selection personal.

The University of London v. *Yarrow* (23 Beav. 159) (Nov. 1856, Sir J. Romilly, M.R.); affirmed (1 De G. & J. 72) (April, 1857, L. C. Cranworth, and L.JJ. Knight Bruce and Turner).

Testator bequeathed £20,000 Consols and the residue of his pure personalty to the University of London "for the founding, establishing and upholding an institution for investigating, studying and without charges beyond immediate expenses endeavouring to cure maladies, distempers and injuries any quadrupeds or birds useful to man may be found subject to; for and towards which purpose of founding, establishing and upholding such Animal Sanatory Institution within a mile of

either Westminster, Southwark or Dublin as may at the time for making a decision as to locality," by the Chancellor, &c., of the University of London, "be thought most consistent and expedient"; he directed the residue to accumulate not exceeding fifteen years from his death and to be applied "solely for the object of founding, establishing and upholding the Animal Sanatory Institution as aforesaid." He directed a superintendent or professor to be appointed, to have a residence adjacent to the institution, to have a salary, to give certain free lectures; the principle of kindness to animals was to be observed:

Held (1) a charity, and (2) not void by the Georgian Mortmain Act, as there was the alternative of establishing the institution in Ireland, to which that Act does not extend.

In re Michel's Trusts (28 Beav. 39) (March, 1860, Romilly, M.R.).

A gift by a Jew to a congregation in Poland was held good. See the case more fully stated in the chapter on Superstitious Trusts, p. 51.

A.-G. v. *Fraunces* (W. N. 1866, 280) (July, Romilly, M.R.).

Mary Whalley, of Bruton, in Virginia, United States, devised some land on which stood a school called Mattey's School, to trustees on trust to teach the neediest children of the parish in reading, writing, and arithmetic; and bequeathed £50 and her residuary personal estate to the trustees for the use of the school; and appointed one Fraunces executor. She died in 1742, and her executor came to England with some of her money, and this suit was brought against him, and he was compelled to pay a sum of money into Court. This sum had accumulated and amounted to £2500.

Mattey's school had long ceased to exist, but there was in the same parish a college of William and Mary, with a free school in connection with it. The governing body of this college petitioned for payment of the money to them.

The Master of the Rolls, after inquiring whether any Court in Virginia would administer the fund and not finding any such Court, directed the money to be paid to the petitioners, they

undertaking to apply the fund for the purposes mentioned in the will.

In re Duncan, In re Taylor's Trusts (L. R. 2 Ch. 356) (March, 1867).

A testator had left property in England to trustees in England to be applied by them in such manner as they should think fit for the promotion of Christian education in the island of Jamaica.

New trustees.

It was held that the consent of the Charity Commissioners was necessary to a petition for the appointment of new trustees; but in other respects the Court had jurisdiction to make the order.

New v. *Bonaker* (L. R. 4 Eq. 655) (July, 1867, V.-C. Malins).

Testator, a British subject, who died in Canada, gave pure personal estate to the President and Vice-President of the United States, and the Governor of Pennsylvania, for the time being, on trust to invest part in land in Pennsylvania and accumulate the rest and the rents of the lands till the accumulated fund amounted to $100,000, and then apply it and the land in endowing a college for the instruction of youth in the state of Pennsylvania, where moral philosophy and the rights of black people should be taught.

Refusal of trustee held fatal.

The trustees named declined to accept the trusts:

Held, that as the Court could not execute a scheme out of its jurisdiction, the trust failed, and the fund went to the testator's residuary legatees.

Mayor of Lyons v. *Advocate-General of Bengal* (1 App. Cas. 91) (Feb. 1876, Privy Council).

Testator gave certain annual sums to relieve poor debtors in prison at Calcutta and Lyons respectively, and a third sum for Lucknow in terms which were declared void. His residuary clause directed that if a surplus of ten lacs remained it should be divided in such a manner as to increase the three establishments. A fund was paid over to the Mayor and commonalty of Lyons. The Calcutta fund was more than sufficient and accumulated, and a scheme was made applying it *cy-près* with-

Scheme for Calcutta fund.

out citing the Mayor of Lyons, who petitioned against it and appealed:

Held, that the order was right; for the gift was an absolute charitable gift capable of being applied *cy-près*, and the petitioner as one of the residuary legatees under the will was not entitled to any portion of the money not required for the original gift.

This case arose under the same will as *Mayor of Lyons* v. *East India Company* (1 Moore, P. C. 175) (Dec. 1836).

In *Makcown* v. *Ardagh* (Nov. 1876) (I. R. 10 Eq. 445) a legacy to a society for missionary purposes in Patagonia, Chili, and Peru, was paid over without any question being raised except as to the identity of the society named.

Yeates v. *Fraser* (22 Ch. D. 827) (Feb. 1883, Fry, J.).

A testator, a native of Scotland, but residing and apparently domiciled in England, left his residuary estate to his "executors and two or more trustees to be appointed by them in trust to be invested for the benefit of the blind in Inverness-shire in such manner as they may deem best," adding, "but I wish the capital to be intact and the interest only employed."

The surviving executor declined to act as trustee of the residuary estate, or to appoint new trustees.

Liberty to apply for scheme.

The Court directed a reference to the Court of Session in Scotland to settle a scheme for the administration of the charity; and gave liberty to the Attorney-General, and not to the declining executor, to apply to the Scotch Court in respect of the same.

CHAPTER XXIV.

On Mortizing, or Gifts which offend the Georgian Mortmain Act.

Provisions of Georgian Mortmain Act.

The Georgian Mortmain Act provided that all gifts of personal estate to be laid out in the purchase of land, or any estate or interest therein, or any charge affecting the same, in trust for any charitable use, should be void, unless made in manner prescribed by the Act. It then required an actual transfer, made six months before the death of the donor, for an effectual gift of stock in the funds for the purpose indicated; and a deed executed in the presence of two witnesses and enrolled within six months, and furthermore a lapse of a year from the execution of the deed to the death of the donor, for a gift of other property.

Provisions of Mortmain Act, 1888.

These provisions are reproduced in the Mortmain and Charitable Uses Act, 1888, with a difference of expression. That is to say, the last-mentioned Act enacts (sect. 4) that every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses shall be void, unless made in the prescribed manner; and declares, in sect. 10, that in the Act, unless the context otherwise requires, "land" includes tenements and hereditaments corporeal and incorporeal of whatever tenure, and any estate and interest in land. We shall devote a later chapter to the discussion of this Act, and there give reasons for holding that it is not intended to alter the law in this respect. We will therefore proceed to state the effect of the decisions under the Georgian Mortmain Act.

We may mention first of all that the Act did not apply to wills made before the date of its commencement, *i.e.* June 24,

Wills made prior to Georgian Act.

1736 (*Ashburnham* v. *Bradshaw* (2 Atk. 36); *A.-G.* v. *Downing* (Amb. 549)).

This result was in accordance with the old view of a will of lands, namely, that such a will was an immediate conveyance, though not coming into operation till the death of the testator, and revocable by him while he lived.

Direction to buy land.

Secondly, an express direction to buy lands and use them or apply the rents and profits of them for charitable purposes, is made void by the clear words of the Act. This is too plain for the contrary ever to have been argued, but there are many cases in which it has been admitted (*Kirkbank* v. *Hudson* (1819) (7 Price, 212); *Mann* v. *Burlingham* (1836) (1 Keen, 235)).

But a trust to buy land for charitable purposes, created by a will made before the Georgian Mortmain Act, may still be exercised (*A.-G.* v. *Solly* (1835) (5 L. J. N. S. Ch. 5)).

To invest on mortgage.

Thirdly, a direction to invest money on mortgage of land, and apply the interest for charitable purposes, is also clearly made void by the Act; and it has been held that the word "mortgage" alone means mortgage of lands, and renders such a gift void (*Baker* v. *Sutton* (1836) (1 Keen, 224)); and the words "real security" have the same effect (*A.-G.* v. *Bowles* (1754) (2 Ves. Sr. 547)).

To pay debt on charity estate.

Fourthly, it has been held that a bequest for paying off a debt upon land already devoted to charitable purposes is made void by the Act (*Corbyn* v. *French* (1799) (4 Ves. 418); *Waterhouse* v. *Holmes* (1828) (2 Sim. 162, a case of an equitable charge); *In re Lynall's Trusts* (1879) (12 Ch. D. 211)).

But a bequest may be validly made for paying a debt incurred by the trustees of a charitable institution, for which they are personally liable, and for which the land belonging to the charity is not liable (*Bunting* v. *Marriott* (19 Beav. 163)).

Purpose requiring land.

Fifthly, a direction by a testator to lay out money for a charitable purpose which practically involves the acquisition of land is void.

It was held by Lord Hardwicke in some early cases that

a direction to erect a school-house (*A.-G.* v. *Bowles* (1754) (2 Ves. Sr. 547); *Gastril* v. *Baker* (1747) (cit. 2 Ves. Sr. 185)) or hospital (*Vaughan* v. *Farrer* (1751) (2 Ves. Sr. 182)) merely meant to build it, if land were lawfully found by other means; but these cases were soon overruled.

Result of cases.

It is now therefore settled that a direction contained in a will to erect, build, found, or establish a school, almshouse, hospital, slaughter-house, church, chapel, or other charitable institution, is a direction involving the acquisition of land within the meaning of the Georgian Mortmain Act, and consequently void.

Cases.

The following is a list of cases in which such gifts have been held void, arranged in chronological order. Other cases will be found under other headings in this chapter, involving this point as well as others.

Pelham v. *Anderson* (1764) (2 Eden. 296). Direction to build and endow an almshouse.

A.-G. v. *Nash* (1792) (3 Bro. C. C. 588). To erect and build a school-house.

Chapman v. *Brown* (1804) (6 Ves. 404). To build or purchase a chapel. This case reviews the former cases, and overrules, on this point, *A.-G.* v. *Bowles* (2 Ves. Sr. 547).

Pritchard v. *Arbouin* (1827) (3 Russ. 456). To keep in reserve certain consols, and sell the same when an opportunity offers for building a Swedenborgian chapel, and contribute the same towards the building and its support.

Giblett v. *Hobson* (1834) (5 Sim. 651). Towards building almshouses for a certain institution.

A.-G. v. *Hodgson* (1846) (15 Sim. 146). The establishment or institution of a charitable receptacle for old men.

Smith v. *Oliver* (1849) (11 Beav. 481). Erecting six almshouses.

A.-G. v. *Hull* (Feb. 1852) (9 Hare, 647). Establishing a school.

Longstaff v. *Rennison* (May, 1852) (1 Drew. 28). Establishing a school.

Re Clancy (Aug. 1852) (16 Beav. 295). Establishment of a charity school.

Hopkins v. *Phillips* (July, 1861) (3 Giff. 182). To found a chapel for the deaf and dumb.

Tatham v. *Drummond* (1864) (34 L. J. Ch. 1). Establishment near London of slaughter-houses away from densely populated places.

In re Watmough's Trusts (1869) (L. R. 8 Eq. 272). Erection of a new Wesleyan chapel in the town of H., instead of the one now in use, when such an erection shall take place.

Hawkins v. *Allen* (1870) (L. R. 10 Eq. 246). Establishing a hospital.

Pratt v. *Harvey* (1871) (L. R. 12 Eq. 544). To be applied towards the expenses of building another chapel at N., in connection with the Established Church. In this case £500 was saved by the Act 43 Geo. 3, c. 108.

Cox v. *Davie* (1877) (7 Ch. D. 204). Erection of a building as a dispensary.

Effect of direction before Act considered.

In doubtful cases of this nature the principle laid down (see *A.-G.* v. *Williams* (4 Bro. C. C. 525, *infrà*), and *Tatham* v. *Drummond* (34 L. J. Ch. 1, *suprà*)) is that the Court should consider how the testator's directions would have been carried out prior to the Georgian Mortmain Act. If, prior to the Act, they would have involved the purchase of land, the gift is void, as in the cases above mentioned. But if, prior to the Act, the trust would have been carried out without purchasing land, then the gift is good.

Direction to apply income good.

On this principle decisions have been given on gifts of pure personalty on trust to keep the same so invested, and apply the dividends in or towards keeping up a school. Such gifts have been held good, and the judges have suggested that the teaching might take place in a church, or vestry, or the master's own house, or a hired room. The hiring of land would appear to offend the principle of the Georgian Mortmain Acts; but it may be taken to be settled by these cases that it may lawfully be done under such a trust.

Hiring land permitted.

The following are the cases on this branch of our subject in which bequests have been held good :— Cases.

A.-G. v. *Williams* (1794) (4 Bro. C. C. 525) (2 Cox, Eq. 387). Bequest of consols to trustees, and direction to apply dividends towards establishing a school at T.

Johnston v. *Swann* (1818) (3 Mad. 457). Bequest of £7100 to be invested in the funds, the dividends to be applied in paying the expenses of providing a school-house, and keeping up a school.

Cawood v. *Thompson* (1853) (17 Jur. 798). Bequest of £4000 to be invested and dividends applied in or towards the maintenance of a school, with a prohibition of buying land or building, as the testatrix expected others to do that.

Hill v. *Jones* (1854) (2 W. R. 657), a bequest of £2000 to pay a master and mistress, adding that the testator had intended to devise a house for a school, but was prevented by the law, held good.

Hartshorne v. *Nicholson* (1858) (26 Beav. 58). Two sums of £5 and £15 a year for ever bequeathed for educating the poor children of a certain parish.

In *Braund* v. *Earl of Devon* (1868) (L. R. 3 Ch. 800), a will directed the establishment of a school, coupled with directions concerning the income. The validity of the bequest was not challenged. If valid, it would be an instance of the doctrine now under consideration.

Emley v. *Davidson* (19 Ch. D. 156) (Nov. 1881, C. A.). In this case certain property was given to trustees for a charity for twenty aged females, one of the trusts being to hire rooms for the reception of twenty females. The terms of the trust are not set out, but Jessel, M.R., said: "The charity is for the purpose of providing poor women with rooms, but the trustees who hire the rooms do not put anything in them; the hiring is only to be temporary, from time to time, and different rooms are to be hired; and there is no ground for saying that such a charity cannot be established without purchasing land, or building

houses, or doing anything which requires land to be permanently devoted to charity."

Taking lease.

However, a trust to establish a school at a house to be taken upon lease is void under the Georgian Mortmain Act (see *Blandford* v. *Thackerell* (1793) (2 Ves. Jun. 238), stated in the chapter on Poor Relations, where the gift was upheld for the legal period, p. 158).

Laying out money on land in mortmain.

The next point calling for attention is this, that it has been laid down in many cases that a trust to lay out money upon land already in mortmain is good. The expression "mortmain" here has an extended signification. It includes land vested in a corporation, and land vested in trustees for charitable purposes.

In *Glubb* v. *A.-G.* (1759) (Amb. 373) a bequest by a rector to build a new parsonage house on the glebe land of his parish was upheld.

In *Brodie* v. *Duke of Chandos* (1773) (1 Bro. C. C. 444, n.) a similar bequest by a stranger was also held good.

In *A.-G.* v. *Parsons* (8 Ves. 186) (Feb. 1803, Lord Eldon) a bequest to employ certain moneys in rebuilding, repairing, altering or adding to and improving certain messuages and grounds which had been duly conveyed by deed enrolled to be used as almshouses, was held good for additions to be made on the land so conveyed, but not to authorize the acquisition of further land.

In *A.-G.* v. *Munby* (1 Mer. 327) (March, 1816, Grant, M.R.) a legacy was given by a rector on trust to build two additional rooms to the rectory house, which was already in mortmain. It was held to be settled law that such a gift was good.

In *Ingleby* v. *Dobson* (1828) (4 Russ. 342) a bequest was made of £2000 to rebuild or enlarge an old school-house, and form a fund to endow the school. The school-house had been built by subscription before the Georgian Mortmain Act on waste of the manor, which was said to have been given by the lord of the manor. It was held on the evidence that it had been

dedicated to the purpose of a school, and the legacy was therefore good.

In *In re Hawkin's Trusts* (33 Beav. 570) (June, 1864, Romilly, M.R.) there was a bequest of £500 to the Rev. W. E. for the enlargement of his church at Merton. The Rev. W. E. was the incumbent of the parish church at Merton. The testatrix died within three months after making her will, and W. E. died a few weeks later, before the legacy was paid.

It was held that the gift was good, evidently because it was for building on land already in mortmain. The judge ordered the amount to be carried to a separate account, saying that it would be paid to the incumbent on proof that the money had been properly expended, and no one else should attend.

In *Champney* v. *Davey* (1879) (11 Ch. D. 949) a bequest of £2000 was made for improving a church, parsonage house, and school. An inquiry was directed whether the two last were in mortmain, with an intimation that the trust was good if they were, but not otherwise. It is difficult to see, however, why an immediate gift to repair a private house is not good as a private gift. A perpetual trust for such a purpose would of course be void for remoteness.

Doubtful cases.

A good many cases have occurred in which there was little doubt that the testator contemplated that his money would be laid out on land otherwise provided; but his gift was open to the objection that he had not sufficiently indicated such land, so as to exclude the acquisition of land from the trusts annexed to his gifts.

Land held to be sufficiently indicated.

We will state first the cases in which it has been held that such land was sufficiently indicated.

In *Sewell* v. *Crewe Read* (1866) (L. R. 3 Eq. 60) a testator in his will said, "I direct my executors to stand seised of the sum of £1000, and to lay out or pay over the same in building the parsonage house at C. in manner as I have already promised the same." The testator had induced the dean and chapter of Westminster, who were the lords of a manor in C., to purchase the copyhold interest in a piece of ground with the view of

dedicating it as the site of a parsonage, and they were willing to convey it for that purpose. The testator had also in a letter to the incumbent of C. expressed his intention to leave £1000 for the purpose. There was glebe land at C. but no parsonage house. The legacy was held good, but the decision went somewhat on the fact that there was glebe land at C., on which a parsonage might be built.

In *Booth* v. *Carter* (1867) (L. R. 3 Eq. 757) there was a bequest of £1000 to the trustees of the Wesleyan chapel at C., "to be applied towards the erection of a new Wesleyan Methodist chapel at C." The trustees, of whom the testator was one, had resolved to build a new chapel at C., and purchased a site, which had been duly conveyed to them in accordance with the Georgian Mortmain Act.

The legacy was held valid. The correctness of this decision was doubted in *In re Watmough's Trusts* (L. R. 8 Eq. 272), which will be mentioned shortly.

In *Cresswell* v. *Cresswell* (1868) (L. R. 6 Eq. 69) there was a bequest of £1000 consols to the executors and the incumbent of B. "to be expended in building a parsonage in connection with that church." The church had been built on a portion of a plot of 3*a*. 2*r*. 0*p*., which had been conveyed to the commissioners for building new churches; and the testator was aware that another portion of this plot had been reserved as the site of a parsonage. It was held that the bequest was intended to be expended on the site so reserved, and was valid accordingly.

Land held not sufficiently indicated.

We will next state the cases in which it was held that there was no land sufficiently indicated, and that the gift was consequently void.

In *A.-G.* v. *Hyde and Hutchinson* (1775) (Amb. 751) a testatrix ordered £1500 to be laid out under the direction of the ministers and churchwardens of R. for the purpose of erecting a free school there. There was a piece of ground at R. belonging to the parish, with a school-house on part of it, and the rest vacant. It was held that the testatrix intended the building of

a new school, and had not sufficiently indicated the existing site to exclude the purchase of land, and the gift therefore failed.

Giblett v. *Hobson* (5 Sim. 651; affirmed on appeal, 3 My. & K. 517) (Nov. 1834) was as follows:—

The butchers of London had formed a charitable institution and resolved to build almshouses, and one, Knight, promised land for that purpose, and put the trustees of the institution in possession of the land. On June 14, 1831, the testator, who was a member of the institution, made his will, by which he gave and bequeathed "to the Butchers' Charitable Institution the sum of £5000 towards building almshouses to the said institution." He died on Nov. 28, 1831, and on Dec. 28, 1831, Knight executed a deed of bargain and sale conveying the land to the institution, which deed was duly enrolled:

Held, that evidence was admissible to place the Court in the situation of the testator, and to enable the judge to suppose himself in the circumstance in which the testator stood:

Held, also, that the evidence did not limit the erection of houses to some particular land already in mortmain, or negative the acquisition of land; and the gift was therefore void.

Semble, the result would have been the same if the conveyance of the land had been made prior to the execution of the will.

The costs were allowed out of the £5000.

In *Dunn* v. *Bownas* (1855) (1 K. & J. 596) there was a legacy of £4500 to the mayor and corporation of N., in trust for the purpose of establishing an almshouse, called a hospital, for twelve widows, paying them £12 a year each, the surplus being applied in finding them coals and clothing. The testator was a member of the corporation, and was aware that the corporation had in some instances provided land for the purpose of similar gifts, and the amount of the allowance was likely to absorb the whole income:

Held, that the terms of the gift involved the acquisition of land, and the gift would not be saved by a mere expectation in the testator's mind.

In *In re Watmough's Trusts* (1869) (L. R. 8 Eq. 272) a testator gave the residue of his estate after his wife's death to his executors "to be given, used, or employed by them toward the erection of a new Wesleyan chapel in the town of H. instead of the one now in use when such an erection shall take place."

The testator died in 1863, at which time the question of building a new chapel was being discussed. His wife died in February, 1868, and in that year the trustees got a lease of land for 999 years and began building a new chapel on it:

Held, void as a gift to build, without specifying land already in mortmain or prohibiting its acquisition. The judge in this case, V.-C. Malins, expressed his opinion that *Booth* v. *Carter* (L. R. 3 Eq. 757), stated above, was wrongly decided.

In *Cox* v. *Davie* (1877) (7 Ch. D. 204) there was a bequest of £1000 consols to the mayor and town councillors of T., to be expended in the erection of a plain simple building as a dispensary at T. The same will contained bequests for endowing a hospital and dispensaries, with a prohibition against laying out the endowment funds in land or buildings. The corporation of T. had power under their charters to acquire and hold land in mortmain for such a purpose as a dispensary, and had land at T. available for the erection of a dispensary.

The bequest of £1000 consols was held void, because it did not indicate any land already in mortmain, or prohibit the purchase of other land.

Effect of prohibition of purchase of land.

It will have been observed that the will in *Cawood* v. *Thompson* (1853) (17 Jur. 798), mentioned above, contained a prohibition against buying land. That clause called for no comment at the time, because the trust in that case was for applying the income annually in teaching, and it is settled by other cases that no land should be bought under such a trust.

Some other cases, however, have occurred in which such a clause has been annexed to a trust, which standing alone would have involved the purchase of land. And the Courts have held the bequest to be good in such cases.

In *Henshaw* v. *Atkinson* (1818) (3 Madd. 306) a testator be-

queathed two sums of £20,000 each to trustees to erect a Blue-coat school and establish a blind asylum at certain places, adding that the moneys should not be applied in the purchase of lands or erection of buildings, as he expected other persons to do that part. A codicil added another £20,000 to the Bluecoat school, and stated that the interest of the £60,000 was to be applied annually for the charities. Eight years had elapsed and no land had been given. Nevertheless the gifts were held good, but the mode of administration was left to be considered when the accounts should have been all taken.

A somewhat similar case was *Dent* v. *Allcroft* (30 Beav. 335) (Dec. 1861, Romilly, M.R.). There was a bequest of £6000 "in or towards the establishing, endowing, maintaining, or supporting of almshouses" at certain places for ten poor persons with such allowances as the trustees should think fit, with power for the trustees to make a scheme for the charity, and words giving them the entire management and disposition of the £6000 and its income, and a direction to them to apply the bequest in such manner as they might think best or most conducive to the charity, but in their sole discretion, "having due regard nevertheless to the application and purposes thereof being consistent with the laws then in force or which might be existing or affecting the same at the time of his decease." Having regard to law.

This was held to be good by virtue of the last words, as involving a direction not to mortize land.

Another similar case was the following:—

Biscoe v. *Jackson* (W. N. 1881, 101) (June 2, V.-C. Hall; on appeal, W. N. 1882, 16). Bequest of pure personalty to trustees on trust to apply the whole or such part as they should think fit of £4000 in the establishment of a soup-kitchen and cottage hospital at S., in such manner as not to violate the Mortmain Acts, such hospital to have not less than four beds, and to invest the residue of the £4000 and another sum of £6000, and out of the income pay a woman to attend to patients, and a surgeon, and apply the residue to the necessities of the hospital; and as to another sum of £2500 pure personalty that the trus-

tees should, so far as they lawfully could, without violating the laws enacted against the disposition of property in mortmain, apply a sum not exceeding £1000 in establishing an Independent chapel at A., and invest the residue of the £2500 and pay the income to the trustees or deacons of the chapel, to be applied by them in providing a stipend for a minister, or in such other manner for the benefit of the chapel as the trustees or deacons should think fit.

All these gifts were held good by the Court of Appeal. The Vice-Chancellor, who only held the first £10,000 good, suggested that it would be open to the trustees to establish a soup-kitchen and hospital upon land already in mortmain, or by begging land or inducing somebody to give it.

We are not aware in what manner the trust was actually carried out in *Henshaw* v. *Atkinson*, but in *Biscoe* v. *Jackson* an inquiry was directed upon the subject, and the chief clerk certified that the fund devoted to the soup-kitchen and cottage hospital could not be applied in accordance with the directions in the will. Thereupon the next of kin asked for the money, but it was held by Kay, J., and affirmed by the Court of Appeal, that the will shewed a general charitable intention in favour of the poor of S., and that the fund would be applied *cy-près* by means of a scheme (*Biscoe* v. *Jackson* (35 Ch. D. 460) (April, 1887)).

This decision appears to us to establish that the clause prohibiting the purchase of land is in itself a *cy-près* direction. It might have been more logical to hold that a trust to fulfil an object requiring land, coupled with a prohibition against purchasing land, would have to operate as a trust conditional upon land being lawfully provided from some other quarter. Such a trust may appear at first sight to be open to the objection of remoteness, unless expressly restricted to arise within legal limits.

We shall discuss this question more fully in the chapter on Remoteness, and submit that in charitable trusts the law allows a reasonable time in every case for the fulfilment of all con-

ditions, and that it is unnecessary for a testator to fix a limit, though it may be wise for him to do so. For the present we will consider the effect of bequests for charitable purposes for which land is required, coupled with a condition as to such land being provided from some other quarter.

Condition of land being otherwise provided.

We have already seen in the case of *Dunn* v. *Bownas* (1855) (1 K. & J. 596) that a mere expectation in the testator's mind that another party will provide land, such expectation being shewn by external evidence, and not expressed in the will, will be insufficient to support the bequest.

Another case, already stated, which came very near to the point which we are now considering, was *Pritchard* v. *Arbouin* (1827) (3 Russ. 456). The words in that case very nearly amounted to saying, "If a site is provided by other means, I give so much towards building upon it." But they did not quite amount to this, and rather said, "If others give something towards a site and building, I contribute also to the general fund for both purposes."

A third case, already stated, which bears on this subject, is *Sewell* v. *Clare Read* (1866) (L. R. 3 Eq. 60). The gift there was to build a parsonage house "in manner as I have already promised the same." There can be little doubt that the testator's promise was conditional on the site being given by the dean and chapter of Westminster. But we have already stated that the existence of glebe land in that case was partly the ground of decision.

We will now proceed to the cases in which there was an express clause respecting the provision of land by others.

We find three cases in which trusts of this nature have been held to be void, namely, *A.-G.* v. *Davies* (1802) (9 Ves. 535); *Mather* v. *Scott* (1837) (2 Keen, 172); and *Trye* v. *Corporation of Gloucester* (1851) (14 Beav. 173); and two in which they have been held to be good, namely, *Dixon* v. *Butler* (1839) (3 Y. & Coll. Ex. 677), a case of a trust supportable under the Act 43 Geo. 3, c. 108; and *Philpot* v. *St. George's Hospital* (1857) (6 H. L. C. 338). The last-mentioned case reviews the earlier

authorities, but does not overrule them. Indeed it expressly recognises *A.-G.* v. *Davies* and *Mather* v. *Scott* as being correct decisions.

In *A.-G.* v. *Davies* (9 Ves. 535) (1802, M. R.; 1804, L. C.) a testator said, "I give £5000, more or less, as it may be wanted, to build twelve almshouses and purchase the ground." He finally gave his residue to the use of the orphan school in C., under the direction of the committee, provided they would furnish a piece of ground to build the houses on, and undertake their management. The committee were willing to furnish a piece of ground. It was held that the direction to purchase vitiated the gift of £5000, and that the gift of the residue failed as being dependent on it, owing to the words "more or less," and the direction as to management. In *Philpot* v. *St. George's Hospital* (6 H. L. C. 349), Lord Cranworth expressed his opinion that the second gift was void because it was conditional on the legatee devoting lands to a charitable purpose. We may take it therefore that a legacy conditional on the legatee conveying lands in mortmain is void.

In *Mather* v. *Scott* (1837) (2 Keen, 172) a testator gave his residue to trustees with a request that they would entreat the lord of the manor of D. or S. to grant a spot of land suitable for the erection of dwellings for a certain charitable purpose. This was held void, as implying a direction to purchase a site if it was not given; and the decision was approved in *Philpot* v. *St. George's Hospital.*

In *Trye* v. *Corporation of Gloucester* (1851) (14 Beav. 173) there was a gift of money to found a charity if land was given for it within ten years (which was done), and a prohibition against laying out any of the money in land. This was held void. This case appears to be inconsistent with *Philpot* v. *St. George's Hospital*, and must be taken to be overruled by it.

In *Philpot* v. *St. George's Hospital* (1857) (6 H. L. C. 338) a testator declared that if any person should give a suitable site at a certain place within twelve months after his death, then he bequeathed £60,000 towards founding a certain charitable insti-

tution there, with a prohibition against laying out any part of the £60,000 in land. A site was given within the twelve months, and the gift was held good by the House of Lords upon full consideration.

In *Dixon* v. *Butler* (1839) (3 Y. & Coll. Ex. 677) there were legacies of £500 towards building a church at a certain place, and £200 towards endowing it, if it was built within seven years after the death of the testatrix. Both gifts were held good. The testatrix survived her will more than three months, so that the gift of £500 was in any case good under the Act 43 Geo. 3, c. 108.

But the judge expressed his opinion that the gift would have been good independently of that Act, on the ground that a gift towards building in such a context did not include the purchasing of land.

We may take it therefore to be established that a gift to establish a charity, conditional on land being provided by others within lawful time, is good. The question of the validity of such a gift, when no time is limited for the land to be given, has been rendered doubtful by the case of *Chamberlayne* v. *Brockett* (L. R. 8 Ch. 206), which will be found discussed in the chapter on Remoteness. But it is established by that case that such a gift is good, if coupled with a devotion of the property to charity in any event, so that if the testator's particular object should fail, the money would be applied by the Court to some other object on the *cy-près* principle.

Remoteness.

In the absence of a devotion of property to charity in any event, the effect of a gift, conditional on others supplying land, would be, that the Court would inquire whether any person would provide the land, and give a reasonable time for an answer to the inquiry, and if no land should be provided, the condition would fail, and as the condition is precedent to the charitable gift, the gift itself would fail also. An instance of this will be found in *Re White's Trusts* (33 Ch. D. 449) (July, 1886), which will be found stated in the chapter on Remoteness.

Gift fails if no land provided.

On the validity of a gift subject to a condition, the fulfilment

of which would render it lawful, we may refer to *Abbott* v. *Fraser* (L. R. 6 P. C. 96) (Nov. 1874), on appeal from Canada.

Alternative Trusts.

As to trusts which, prior to the Georgian Mortmain Act, might with equal propriety have been carried out by purchasing land, or without doing so, it seems that now they are good, and liable to be carried out in the latter way.

Thus, in *Edwards* v. *Hall* (1853) (11 Hare, 1) V.-C. Wood upheld a bequest for endowing district churches or chapels, and this decision was affirmed on appeal in 1855 (6 De G. M. & G. 74). The Vice-Chancellor considered that a trust for the endowment of future churches was good; but the Court of Appeal rested its decision on the ground that the trust included existing churches, and was therefore undoubtedly good on that branch, as endowment merely meant providing annual payments to the ministers. The validity of a gift for endowing a future church is now established by *Sinnett* v. *Herbert* (L. R. 7 Ch. 232).

Again, in *Mayor of Faversham* v. *Ryder* (1854) (18 Beav. 318; affirmed on appeal, 5 De G. M. & G. 350) £1000 was bequeathed for the benefit and ornament of the town. It was objected that land might have been purchased under such a trust before the Georgian Mortmain Act, but the bequest was held good, as the trust could very well be performed without the purchase of land; and a scheme was ordered accordingly.

The result is the same if a testator expressly bequeaths property to one or more of several objects, some involving the purchase of land and some not; or if he directs charitable funds to be invested either in land or in some other investment. In these cases only the branch of the alternative involving the purchase of land is void; the other branch remains as good as if it stood alone. In such cases if the Court does not administer the fund itself, it declares the trust affecting it before directing its payment to the parties entitled to administer it.

Alternative Trusts for Investment.

We will deal with alternative trusts for investment first.

In *Sorresby* v. *Hollins* (1740) (9 Mod. 221) a testator, by will made after the Georgian Mortmain Act, directed his executors to secure two sums of £50 and £5 a year for ever "by purchase of lands of inheritance or otherwise as they shall be advised," and apply the same for certain charitable purposes. This was held good because the words "or otherwise" allowed an investment in pure personalty, and a fund was directed to be invested accordingly.

Again, in *Curtis* v. *Hutton* (1808) (14 Ves. 538) there was a gift of personal estate to be invested in lands or in the funds, with a trust to apply the income for charitable purposes in Scotland. The trust to invest in the funds was held good.

So in *Graham* v. *Paternoster* (31 Beav. 30) (Jan. 1862, Romilly, M.R.) a testator gave the residue of his estate to trustees in trust to convert and invest the proceeds "upon real securities in England or Wales, with full power and authority to change the securities or funds from time to time as they shall see good." He then made a provision for his wife, apparently exhausting the income during her life, and directed the trustees after her death to "pay, transfer, and assign so much or such part of the said trust money, stocks, funds, or securities which shall have arisen or be produced by or from the said residue of my personal estate and effects as by the law shall be applicable to or in favour of charitable bequests and dispositions and as shall be equal to one third" of the whole, to certain charities.

Discretion implied.

The Master of the Rolls thought that the trustees had a discretion to invest the pure personalty on pure personal investments, and that the gift was good.

And in *Re Beaumont's Trusts* (32 Beav. 191) (Feb. 1863, Romilly, M.R.) a testatrix gave property to trustees on trust to invest in the funds or on real securities with power to vary and pay the income to A. for life and on A.'s death transfer the capital to B. The property was invested in the funds and there

remained. B., by deed unenrolled, assigned her reversionary interest to other trustees upon such trusts as she should by deed appoint, and in default for two charities. B. died in A.'s lifetime, leaving a will confirming the gift to the two charities.

The Master of the Rolls held the gift to be good in the events which had happened; but he intimated that the trustees of the first will might have invested the fund on mortgage of land, and that the gift would have failed if the property had been in that state. It will be seen that the alternative power of investment was given by a different instrument from that which devoted the fund to charity, so that there was nothing to take away the discretion of the trustees; but it may be argued that the charitable disposition made by B. rendered it improper for the trustees to alter the investment after the death of A., and so affect the rights of parties; and that the state of facts at the death of B. was the material circumstance.

Alternative trust in prior instrument.

But such a trust will only be good if the will gives the trustees a discretion to invest the fund permanently in pure personal investments. If there is an absolute direction to invest eventually in land, the trust will not be saved by words authorizing a temporary investment in another mode. The case of *Mann* v. *Burlingham* (1836) (1 Keen, 235) is an instance of this; while the case of *Grimmett* v. *Grimmett* (1754) (Amb. 210) appears to be an authority the other way, as the Court held that the trustees had a discretion under words which seem to authorize only a temporary investment in the funds. The latter case must be regarded as overruled; while the general principle is further exemplified by the above-mentioned case of *Pritchard* v. *Arbouin* (3 Russ. 458).

Temporary investment.

The same point was also decided in *Grieves* v. *Case* (1 Ves. Jr. 548) (4 Bro. C. C. 67) (July, 1792, Lords Commissioners Eyre and Ashurst). There a testatrix directed £600 to be laid out in land, adding that until an eligible purchase could be made it should be placed out at interest by C. She declared trusts of the income, some of which were charitable, as will be seen in the chapter on Ministers. The charitable trusts were held to fail

by reason of the direction to buy land. *Grimmett* v. *Grimmett* was cited and disapproved by the Court.

Again, in *Martin* v. *Wellsted* (July, 1854) (2 W. R. 657) a testator gave a sum of money to trustees on trust to invest it and apply the income for the benefit of the poor of the town of Rye, and he empowered the trustees to apply the capital towards establishing or promoting almshouses or other permanent establishment for the poor of Rye which they might think it advisable to establish or promote, adding that it was his wish that the trustees should commence building such almshouses as soon as they conveniently could after his decease. Precatory words.

V.-C. Wood held that the last words rendered the gift void.

Conversely, it would be right to hold that a gift of pure personalty for a perpetual charitable purpose would not be vitiated by the addition of a power to invest it in land, though such power would of course be void; and this view is supported by *A.-G.* v. *Goddard* (T. & R. 348) (Nov. 1823, Plumer, M.R.). There a testatrix bequeathed £1000 India Annuities on a perpetual trust for applying the income for the minister of a contemplated chapel, if it was consecrated within three years, and otherwise for another charitable trust, adding these words: "Lastly, as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift." The chapel was consecrated within the three years. The bequest was sustained, but the judge intimated an opinion that the last clause applied only to the event of the non-opening of the chapel. Power to invest in land.

Again, we must remember that the general doctrine of precatory trusts applies to these cases. Accordingly in *Kirkbank* v. *Hudson* (7 Price, 212) (1819), where a testator added to a charitable gift a recommendation that the money should be invested in land, it was held that his words created an imperative trust to that effect, and left no discretion in the trustees, and so defeated the gift altogether. Precatory words.

Trusts with Alternative Purposes.

We next come to trusts with alternative purposes, one involving the purchase of land and the other not involving it.

We cannot do better than state the cases on this subject in chronological order.

In *Foy* v. *Foy* (1758) (1 Cox, C. C. 163) a legacy for erecting and endowing a hospital in Dorsetshire, was held good for endowing any existing hospital. But this appears to treat the words "erecting and endowing" as equivalent to "erecting or endowing," which is not in accordance with the received rules of construction. (See *Sinnett* v. *Herbert*, next page.)

In *A.-G.* v. *Parsons* (1803) (8 Ves. 186), which has been mentioned above, a legacy to the Mayor of Oxford to be applied in part in repairing, altering, or adding to and improving certain almshouses and their grounds, was held good except as to adding to the grounds, and was ordered to be paid with a declaration to that effect.

In *Ingleby* v. *Dobson* (1828) (4 Russ. 342) a legacy for rebuilding an old school-house or building a new one was held good for the former purpose.

Crafton v. *Frith* (L. J. 20 N. S. Ch. 198) (Feb. 1851, V.-C. Knight Bruce).

Bequest: "The remainder and residue of my property I give and bequeath to A., B. and C. in trust to be purchased into the funds for the purposes hereinafter mentioned, viz. for opening new schools subscribing to those already opened in England, Ireland, Scotland, or elsewhere, and in purchasing land to let out to the poor at a low rent, and the rent to be applied to any benevolent purpose the said A., B. and C. may think proper":

Held, that half was given to opening new schools or subscribing to old ones, and must be applied to the latter purpose by means of a scheme; and that the other half was given to the purchase of land, &c., which was void, so that the next of kin took it.

In the *University of London* v. *Yarrow* (April, 1857) (1 De

G. & J. 72), a legacy for establishing a charitable institution near London or Dublin, was held good for the latter locality, as the Georgian Mortmain Act does not extend to Ireland.

In *Salusbury* v. *Denton* (July, 1857) (3 K. & J. 529) a trust for founding a school or other charitable endowment for the benefit of the poor of O., was held good on the latter branch.

Dent v. *Allcroft* (30 Beav. 335) (Dec. 1861, Romilly, M.R.).

Bequest of £2000 to be applied in or towards the establishing, endowing, maintaining, continuing and keeping up of a day school in the parishes of S. and W. or one of them, or otherwise for school purposes for the children or infants of the said parishes. There were words giving the trustees a large discretion, adding, "having due regard nevertheless to the application and purposes thereof being consistent with the laws then in force."

It was held that the bequest was good as to the alternative of school purposes, and that the result would have been the same without the last clause referring to the law.

In *Sinnett* v. *Herbert* (1872) (L. R. 7 Ch. 232) a residue was given for erecting or endowing an additional church at A. This was held to be a good gift of the pure personalty comprised in the residue, but for the purpose of endowment only, and a good gift of £500 out of the impure personalty, by virtue of the Act 43 Geo. 3, c. 108, such sum of £500 being applicable either for erecting or endowing a church.

In *Morley* v. *Croxon* (1878) (8 Ch. D. 156) a testator left a legacy for supporting or founding free or ragged schools at B. There was a free school at B. It was held that the trust to support schools was valid, and the legacy therefore good.

Gifts to Existing Charitable Associations.

The Georgian Mortmain Act may even defeat a gift to an existing charitable association, if the constitution of the association is such that any money bequeathed to it becomes subject to a trust for investment in land.

Thus in *Widmore* v. *Woodroffe* (1766) (Amb. 636) S. C. *Widmore* v. *Governours of Queen Anne's Bounty* (1 Bro. C. C. 13, 33, n.), a legacy to the corporation of Queen Anne's Bounty was held void, because the rules of that association required all their funds to be laid out in land. And the same result was arrived at in *Middleton* v. *Clitherow* (1788) (3 Ves. 734). The Governours of Queen Anne's Bounty are stated to have altered their rules in consequence of these decisions. They also procured a special Act of Parliament, mentioned in the chapter on Special Exemptions from the Georgian Mortmain Act.

In the case of *The Incorporated Church Building Society* v. *Barlow* (1853) (3 De G. M. & G. 120) a legacy to the plaintiff society was impugned on this principle. But it was shewn that the society was created under the Act (9 Geo. 4, c. 42) abolishing church briefs, and had no power to buy land; but its funds were applicable to aid the enlargement and building of churches, both existing and contemplated. The legacy was therefore held good.

In *Denton* v. *Manners* (Jan. and June, 1858) (25 Beav. 38; on appeal, 2 De G. & J. 675) a testator made a bequest "to the secretary for the time being of the association for buying impropriate tithes and revesting them in the Church of England." A further clause threw his debts, &c. on his impure personalty, and directed his pure personalty to be applied "for the abovementioned charitable purpose."

It was found that he intended an association called the Tithe Redemption Trust, which had other objects besides that mentioned by him.

And it was urged that the bequest should be held good for the other purposes, which did not mortize land. But it was held to be a gift to the association for the purpose named, and therefore void under the Georgian Mortmain Act.

The Application of the Alternative Principle to Societies.

If an existing charitable institution has several objects or purposes, some involving the acquisition of lands, and others

not, a legacy bequeathed to it is good on the alternative principle and applicable to the latter objects.

Thus in *Carter* v. *Green* (1857) (3 K. & J. 591) there was a bequest to a society called the Village Itinerancy. This society was constituted by a deed enrolled, which specified its purpose of teaching certain religious principles by opening and supporting Sunday schools, distributing books, educating ministers, and providing places of worship. The bequest was held good for the purposes not involving the purchase of land, and was handed over with a declaration that it could not be laid out in land.

Again, in *Wilkinson* v. *Barber* (1872) (L. R. 14 Eq. 96) there was a gift to the town trustees of S. on trust to invest and apply the income for the objects for which their existing funds were applicable. An objection was raised that some of their objects involved the purchase of land. But this was overruled, as they had other objects. The judge suggested that when the money was paid over it might be applied for any of the trustees' objects, whether involving the purchase of land or not; but the course taken in *Carter* v. *Green* appears to be more in accordance with principle.

CHAPTER XXV.

On Gifts dependent on Void Gifts.

Principle of cases.

It is an established principle that if a will contains two gifts for charitable purposes, and the second is so dependent on the first, that it cannot take effect in the manner intended by the testator, except on the supposition that effect is first given to the first gift; then, if the first gift fails, the second gift will fail also.

The cases on this subject appear to be all cases in which the first gift failed under the Georgian Mortmain Act, as being a gift of land or a gift involving the purchase of land; and the second gift was a gift to build upon the land or endow the charity for which the land was intended.

The following is a summary of the cases in chronological order. The cases of *A.-G.* v. *Stepney* (1804) (10 Ves. 22) and *Limbrey* v. *Gurr* (1819) (6 Mad. 151) will be seen to be instances of gifts which were held good, though connected with other gifts which failed; and *Baldwin* v. *Baldwin* (No. 1) (1856) (22 Beav. 413) is a somewhat similar case. In these cases it was held that the connection was not so essential as to make the good gift dependent on the void gift.

Connection not essential.

Digest of cases.

Durour v. *Motteux* (1749) (1 Ves. Sen. 320). This case will be found stated in the chapter on Tombs. It will be seen that several gifts failed as depending on a gift of a sum of money to be laid out in land for charitable purposes. The nature of the primary charitable purposes is not stated in the report.

In *A.-G.* v. *Hyde and Hutchinson* (1775) (Amb. 751) (L. C. Apsley), which has been mentioned in the chapter on Mortizing, a legacy of £1500 to build a school at R. was held void as involving the purchase of land; and, therefore, a further gift of

£2000 to be invested on trust to apply the income in paying the salaries of a schoolmaster and mistress, was held to fail also, as being dependent on the prior void legacy.

A.-G. v. *Goulding* (Dec. 1788) (2 Bro. C. C. 428) (Buller, J.). Testatrix gave nine houses, eight to eight poor people that had paid most and longest to the poors' books in St. Mary Overy's parish as the books should prove, the corner house being to repair them, adding: "And the dividends of £800 £4 per cent. annuities I give to the eight houses for ever, to each house the £4 every year for ever:

Held, the devise being void, the gift to accompany it was void also and would not be applied *cy-près*.

A.-G. v. *Whitchurch* (3 Ves. 141) (June, 1796, Sir R. P. Arden, M.R.). Testator devised four houses to churchwardens in trust for them to "give to such poor men of this parish as they think fit; if any of the descendants of J. apply, I desire that they may be preferred: and as I intend these four houses to be in the manner and custom of almshouses for men and their wives, I give and bequeath to the churchwardens of the parish £2000 £4 per cent. Government securities in trust for them to dispose of the interest thus:—to give to each of the four persons that they allow to inhabit the four houses £13 per annum or 5*s.* a week, to be paid weekly, monthly, or at their discretion; that is for a man and his wife: if one of them die, the single one to have 3*s.* 6*d.* a week, and not permitted to bring in a second husband or wife."

Testator afterwards conveyed the four houses by deed enrolled to trustees to such charitable purposes; but he died within twelve months of the execution of the deed:

Held, the devise being void, the bequest annexed to it was void also, and would not be executed *cy-près*.

Chapman v. *Brown* (6 Ves. 404) (July, 1801) will be found fully stated in the chapter on the Effect of Failure. It will be seen that when a will contained a trust to build a chapel, and also a trust for support of a minister, the Court made the presumption that the minister was intended to conduct services in

the chapel, and that the trust for him was therefore dependent on the trust for the chapel and failed with it.

A.-G. v. *Davies* (9 Ves. 535) (M.R., 1802; L. C., June, 1804) was a case which was decided on the ground that a portion of the charitable bequests were void under the Georgian Mortmain Act, and that the rest of the bequests were dependent on the void part. A short statement of it will be found in the chapter on Mortizing, p. 320.

A.-G. v. *Stepney* (10 Ves. 22) (July, 1804, L. C. Eldon). Testatrix devised a house to trustees on trust to deposit in it all the bibles, testaments, and other religious books and tracts for the use of the Welsh Charity School for the increase and improvement of Christian knowledge which she should have at her death, and all other books and tracts as in pursuance of the trusts after declared should be purchased for the said charitable purposes or should be given by charitable and well-disposed persons; and to preserve and keep all the books and tracts in the house for the said uses; and for that purpose to permit her servants, whom she named, or such of them as should look after the books, to live in the house clear of rent and taxes, directing that they should live there during their respective lives, notwithstanding the books might have been given away. And she directed her executors to put various articles of furniture into the house to be enjoyed with it by her said servants, and afterwards to fall into her residue. She then recited that there might be at her death several bibles and religious books, pamphlets, and tracts, bought with the contributions of several well-disposed persons for the use of circulating Welsh Charity Schools and for the increase and improvement of Christian knowledge and some cash and securities from contributions for the like purposes; and that she was by the will of J. entitled to his estate for charitable purposes, and she then gave to the trustees all the bibles and other religious books, pamphlets, and tracts which she might have in her possession and keeping at the time of her decease arising from such contributions as aforesaid, together with all and every the books and estate of J. which

she might be possessed of at her death and all her own personal estate on trust to dispose thereof for the use of the Welsh Circulating Charity Schools as long as the same should continue and for the increase and improvement of Christian knowledge and promoting religion in such manner as the trustees for the time being should think most proper and conducive to the said charitable purposes; and, moreover, that they should purchase new bibles and other religious books for the same purposes, and dispose of the said books and personal estate accordingly; and in the meantime deposit all the said bibles, books, pamphlets, and tracts in the said house allotted for the keeping and care thereof. There was a provision for keeping up the trustees.

The institution referred to was started by J., and managed after his death by the testatrix, to teach the Welsh language, also reading and writing, to find Bibles, teach the Church catechism, and give Church of England teaching. Welsh schoolmasters were trained and sent out, and school inspectors also:

Held, that though the trusts of the house for charity were void, the gift of the residue was good, being independent of the house, and a scheme ordered.

Limbrey v. *Gurr* (6 Mad. 151) (July, 1819), which will be found stated in the chapter on the Effect of Failure, contains several examples of dependent gifts. It will be seen that a conveyance of an intended site for almshouses was held void, and thereupon certain trusts for building and repairing them failed also; and a trust to pay certain weekly sums to certain poor persons failed also, because the Court considered that they were intended to be the inmates of the almshouses. It will also be seen that when the only connection between a void charity and a valid charity consisted in a common set of governors, a common clerk, and a trust for building a common committee-room on the intended site of the void charity, these circumstances were insufficient to make the valid charity fail with the void one.

Adams v. *Lembery* (cit. 2 J. & W. 274) in *A.-G.* v. *Hinxman* (1820), where it is said that some of the aforesaid cases, and a late case of *Adams* v. *Lembery* before the Vice-Chancellor,

establish the proposition that a bequest of personal property, intended to be employed for charitable purposes upon premises, the devise of which is void by the Statute of Mortmain, must fail, as being connected with and subsidiary to the void devise.

A.-G. v. *Hinxman* (2 Jac. & W. 270) (Dec. 1820, Sir T. Plumer) may also be found stated in the chapter on the Effect of Failure. It will be seen that a bequest for maintenance of a schoolmaster failed because the will contained a void devise of a house for his use.

Price v. *Hathaway* (6 Mad. 304) (Feb. 1822, V.-C. Leach). P. purchased land from L. for its full value, £815, and had it conveyed to the plaintiffs on trust to let it form the site of certain almshouses. He left by will £15,000 to build the almshouses and £30,000 to endow them, with other sums amounting to £12,000 to be eventually added to the £30,000. He gave the residue of his estate to his wife, appointed her and H. executors, and the will also contained a gift over to her of any property intended for charity, of which the trusts should fail. He died six weeks after the execution of the deed and will. The plaintiffs sued both L. and the testator's wife and H. claiming both the land and the money.

It was held that the testator, and not L., was the donor, whose death within twelve months avoided the deed; and the deed being void, the charitable gifts in the will failed as dependent on it, and the property belonged to the wife. But an inquiry was directed, who was the testator's heir-at-law. The last inquiry looks as if the Court considered that the deed operated to convey the legal estate from L. to the plaintiffs, and that the charitable trusts only failed, and a resulting trust of the land arose for P. and his heirs.

Smith v. *Oliver* (11 Beav. 481) (Jan. 1849). Bequest of £2000 stock to the churchwardens and overseers of T. on trust to apply £800 in building six almshouses, and apply the income of the rest to making allowances to the inmates:—*Held*, all void.

Baldwin v. *Baldwin* (No. 1) (22 Beav. 413) (July, 1856, Romilly, M.R.). Bequest of £4000 pure personalty to be

settled on trust to provide stipends and annuities for nine poor persons, accompanied with a devise of nine freehold houses to testator's sister, and a clause saying, "I beg to point out to my said sister, but without intending to impose upon her any obligation legal, equitable, or moral, that the aforesaid messuages," &c., "which are hereinbefore devised to her might be converted into eligible almshouses for the recipients of the income of the said trust fund of £4000 if in her absolute discretion she should think fit to extend or further endow the said intended institution." A codicil revoked so much of the will as related to the building of certain almshouses and the stipends and annuities connected therewith.

The Master of the Rolls thought that the gift of £4000 in the will was good, but he held that it was revoked by the codicil.

Cramp v. *Playfoot* (4 K. & J. 479) (July, 1858, V.-C. Wood) may also be found in the chapter on the Effect of Failure. It will be seen to be a simple case of the failure of a trust to build a school upon a site expressed to be devised for the purpose by the same will.

Green v. *Britten* (42 L. J. N. S. Ch. 187) (Dec. 1872). Devise of a freehold house to be a sailors' home, and bequest of £10,000 to endow it:—*Held*, both void; the bequest not liable to be applied *cy-près*.

Cox v. *Davie* (7 Ch. D. 204) (Nov. 1877) will be found partly stated in the chapter on Mortizing. The testator there gave to the mayor, &c., of T. £3000 consols, and directed £1000, part thereof, to be expended in the erection of a plain simple building as a dispensary, and that the remaining £2000 should be held by them as an endowment fund for the dispensary.

The gift of the £1000 being held void under the Georgian Mortmain Act, the gift of the £2000 was held to fail as dependent on the £1000.

In re Taylor's Estate, Martin v. *Freeman* (W. N. 1888, 32) (Feb. 8, Kay, J.). A statement of this case will be found in the chapter on the Effect of Failure. A trust to build a hospital and pay sums to inmates failed as dependent on a conveyance of land, which became void.

CHAPTER XXVI.

On Impure Personalty.

Question if law altered.

Before entering upon the subject of this chapter, we will premise that the Mortmain and Charitable Uses Act, 1888, is so worded as to give rise to a contention that it effects an alteration in the law on this subject. We shall discuss this point in the chapter devoted to that Act, and will merely mention for the present that we shall submit that it leaves the law unaltered.

(i.) *The Georgian Mortmain Act.*

It will be seen that the Georgian Mortmain Act makes void all conveyances and gifts of certain specified property in trust for or for the benefit of any charitable uses whatsoever, unless certain formalities are complied with. Now all personal estate which comes within the provision of this statute is called impure personalty, while personal estate which is not affected by the statute is called pure personalty. The reason these words are adopted will appear immediately.

The statute enacts in its first section that "no manors, lands, tenements, rents, advowsons, or other hereditaments corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments shall be given, &c., or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless" certain conditions and formalities are complied with.

Again, the 3rd section of the Act enacts: "That all gifts,

conveyances, &c., of any lands, tenements, or other hereditaments or of any estate or interest therein or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same to or in trust for any charitable uses whatsoever which shall—after the commencement of the Act—be made in any other manner or form than by this Act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

Kinds of property affected by Act.

It is unnecessary for our present purpose to consider the conditions and formalities required by the Act, but it will be well to mention that every gift of stock in the funds is required to be effected by transfer in the bank books six months before the death of the donor, and every other gift and conveyance is required to take effect immediately and without the reservation of any benefit to the grantor, and to be made by deed attested by two witnesses and enrolled within six months in the Chancery Enrolment Office; and every conveyance, not being on a sale at full value, must be made twelve months at least before the death of the donor.

Thus, no gift of the forbidden property can be made by will for a charitable purpose. And it is under wills containing charitable bequests that questions under this statute usually arise.

To save misconception, we ought to mention that there are some charities excepted out of the statute, but it will be beside our subject to consider them in this chapter. The statute has also been modified by later statutes, which allow the reservation of the benefit of building covenants, and sales of land to charities in consideration of perpetual rents. The present state of the law on these points will be found in the chapter on the Mortmain and Charitable Uses Act, 1888.

It will be seen that the Georgian Mortmain Act practically

forbids four kinds of property to be left by will for charitable purposes, namely:—

Realty and impure personalty

(1.) Land.

(2.) Interests in land.

(3.) Charges upon land.

(4.) Money to be laid out in land, or in interests in land, or in charges upon land.

This, therefore, includes not only realty but also such personalty as, in legal language, savours of realty. Hence such personalty is called impure personalty; while personalty not in any way savouring of realty is called pure personalty.

(ii.) *Real and Personal Estate.*

We shall find it useful here to make a list of the principal kinds of property, in two columns, placing in one column those which, on the death of a male owner intestate, devolve on his heir-at-law, or heir in tail, or customary heir, and in the other column those which, in the like event, vest in his administrator for the payment of his debts, and of which the surplus is distributable among his next of kin, subject to the right of his widow to her share.

We may mention at once that this division is not identical with the division of property into real and personal estate. These words are used arbitrarily; and, according to common usage, estates *pur autre vie* in real estate are always called real estate, although they devolve as personal estate in some cases (see item 18 below). We believe also that the obscure class consisting of personal annuities granted to the grantee and his heirs, constituting item 5 in the first column, would ordinarily be called personal estate, although they devolve on the heir.

I.	II.
Property devolving on the heir-at-law, heir in tail, or customary heir, and known as real estate, except, perhaps, item 5.	Property devolving on the administrator, and known as personal estate, except item 18.

I.	II.
1. Freehold land, held in fee or in tail, either in possession or remainder or reversion, and either absolutely or determinable on the happening of any event.	1. Freehold land, held for a term of years, either absolutely or terminable by notice, or on the happening of any event.
2. Copyhold land held for any customary estate, except an estate *pur autre vie*, which is mentioned below, and an estate for years, which is mentioned beside.	2. Copyhold land held for any term of years, absolute or terminable, whether the lease be granted by licence of the lord, or under the custom of the manor, and whether it be granted by deed or by surrender.
3. A family vault appurtenant to a house. Also rights of exclusive burial granted to one and his heirs under the Burials Board Acts (*Matthews* v. *Jeffery*, 6 Q. B. D. 290).	3. Rights of exclusive burial under the Cemeteries Clauses Act, 1847.
4. Rent-charges in fee or in tail, either absolute or determinable on the happening of any event.	(4.) (*a.*) Mortgage debts. (*b.*) Legacies, whether payable out of real or personal estate of the legator, or out of both.
5. Personal annuities granted to the grantee and his heirs.	5. Personal annuities granted to the grantee simply, or to him, his executors, administrators, and assigns.
6. An advowson.	6. A next presentation.
7. The rent of freehold or copyhold land held in fee or in tail, to become due after the expiration of the quarter in which the owner dies; and the	7. The rent of land, which accrued due during the owner's life; and the apportioned part of the rent current at his death, corresponding to the

I.	II.
apportioned part of the rent for the current quarter corresponding to the number of days after the owner's death.	number of days which he lived since the last preceding rent-day.
8. Timber and other trees growing upon land of inheritance, and all crops which are not sown and reaped within a twelvemonth.	8. Emblements; that is to say, those crops which are sown and reaped within a twelvemonth, and have been sown but not reaped at the owner's death. A right to emblements accrues with respect to crops sown on land held for life, in tail, or in fee.
9. Wild animals, not in captivity, *e.g.* fish in a pond.	9. Tame animals, and wild animals in captivity, *e.g.* fish in a tank.
10. (*a.*) The beneficial or equitable right to money, or other personal estate, which is impressed with a trust for investment in land of inheritance.	10. (*a.*) The beneficial or equitable right to land, which is impressed with a trust for conversion into money.
(*b.*) Real estate of which partners are co-owners, but which does not form part of their partnership assets.	(*b.*) Real estate forming part of the assets of a partnership.
11. Shares in companies, which are made real estate by the Acts of Parliament constituting them, such as the New River Company, the Avon Navigation, and the now extinct River Dun Navigation (*Cadman* v. *Cadman*, L. R. 13 Eq. 470).	11. Shares in all companies except those mentioned in the corresponding item in the other column. Also debentures of companies and bonds of corporations and local authorities.

I.	II.
12. Tithes.	12. Debts in general, including the securities of foreign governments.
13. Heirlooms, in the legal sense of the word; the title-deeds of land, the box containing them, and its key, and the keys of doors and gates on real estate, *i.e.* land held in fee or in tail.	13. Furniture and moveable articles in general, except such as are comprised in the other column.
14. All buildings, and all fixtures substantially attached to real estate, *i.e.* land held in fee or in tail; and ornaments and appurtenances forming part of the architectural design of a house so held, or essential adjuncts to it, as an unfurnished house.	14. Fixtures erected by the tenant on land held for years or for life, or in right of a benefice, or *pur autre vie;* and ornaments (*e.g.* carpets or glasses) temporarily attached to a house (*e.g.* by nails only), but not forming part of the architectural design of the house or essential adjuncts to it as an unfurnished house; and that whether such house be held in fee, or in tail, or otherwise.
15. Easements; also franchises, and rights of common or *profits à prendre*, whether appendant, appurtenant, or in gross; at least, if held in fee or in tail, or appendant or appurtenant to land so held.	15. The same held for years, or appendant or appurtenant to land so held.
16. The right to bring an action to recover real estate.	16. The right to bring an action to recover damages for a trespass done to real estate; and other rights of action other than for the recovery of real estate.

I.	II.
17. Other interests in land, except those specified in the adjoining column.	17. Other property, not being interest in land, including therefore—money, stock in the Government funds, patents, copyrights, trade-marks, trade-names, and all limited interests in personal estate, also ships, and shares in ships.
18. Estates *pur autre vie* in land, rent-charges, and other real estate, limited to the donee and his heirs.	18. Estates *pur autre vie* in land, rent-charges, and other real estate, limited to the donee simply, or to the donee, his executors, administrators, and assigns, or otherwise to the donee without constituting his heir special occupant; and even like estates limited to the donee and his heirs, when the donee dies without an heir.

We will conclude this list by again mentioning that the last item in the right-hand column, consisting of certain estates *pur autre vie*, is called real estate, although it devolves like personal estate. It is said to differ from ordinary personal estate in one respect, namely, that the executor or administrator takes it, not *virtute officii*, like other personal estate, but as special occupant if he is named in the grant, and by virtue of a certain Act of Parliament if he is not so named. This distinction, however, appears to be more theoretical than practical. The origin of the anomaly is historical. Originally, if no special occupant was named, and the tenant *pur autre vie* died, the law stood thus; if the subject of the estate was corporeal, such as land, the first person who got possession was allowed to hold it for the rest of the life of the *cestui que vie;* but if the subject was incorporeal, such as a rent-charge, it became extinct. Parliament then set to work to remedy this anomaly, and, somewhat

incongruously, gave the rest of the estate to the personal representative. (Stat. Frauds, 29 Car. 2, c. 3, s. 12; now replaced by the Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, ss. 3, 6.)

(iii.) *Is all Realty Pure Realty?*

We can now consider in more detail what property is and what is not within the Georgian Mortmain Act. First let us cast our eye down the left-hand column in the above list. Here we see two items of property, far different from all the rest, and appearing at first sight not to come within any of the four headings included within the Georgian Mortmain Act. These two items are numeros 5 and 11, namely, personal annuities limited to the grantee and his heirs, and shares in the New River and other kindred companies.

Personal annuities limited to heirs.

These personal annuities are rarely met with, and we have failed to find any direct decision with respect to them, as to whether they are or are not within the Georgian Mortmain Act. It has, however, been decided that they are not within the Statute de Donis, nor within the clause of the Statute of Frauds, requiring three witnesses for a will of lands. The fair inference from these cases, therefore, is that they are likewise excluded from the Georgian Mortmain Act, seeing that they are neither within its letter nor its spirit.

As these annuities have called for our attention more from the anomalous position which they hold, than from their actual importance, it is not worth while to enter into a more lengthy discussion of their incidents, and we must content ourselves with giving our readers a reference to the cases relating to them. The cases are the following:—

1. *Earl of Stafford* v. *Buckley* (3 Ves. Sen. 170) (Feb. 23, 1750), as to the Statute de Donis.

2. *Turner* v. *Turner* (Amb. 776) (1783), also as to Statute de Donis.

3. *Countess of Holdernesse* v. *Marquis of Caermarthen* (1 Brown's Ch. Ca. 375) (1784), as to Statute of Frauds.

4. *Radburn* v. *Jervis*, and *Hare* v. *Hill* (3 Beav. 450) (Feb.

22, 1841). It will be seen that these annuities are not assets in the hands of the executors for payment of the debts of a deceased owner.

New River shares.

Let us next consider the New River shares. On looking at the cases in which these shares have been held or assumed to be real estate, we do not find the nature of the company set out in any of them, or any reasons given for holding the shares to be real estate :—

Drybutter v. *Bartholomew* (2 P. Wms. 127) (1723, Rolls Ct.); *New River Company* v. *Graves* (4 Vern. 431) (March 2, 1701, Court of Chancery); *Lord Sandys* v. *Sibthorpe* (2 Dickens, 545) (July 4, 1778, Court of Chancery); *Swayne* v. *Fawkener* (Shower's Parl. Cases, 207); *Townsend* v. *Ash* (3 Atk. 336) (May 13, 1745, Lord Hardwicke); *Davall* v. *The New River Company* (3 De G. & Sm. 394) (V.-C. Knight Bruce, April 19, 1849).

The company was, however, constituted in consequence of the Acts 3 Jac. 1, c. 18, and 4 Jac. 1, c. 12. The former of these Acts enacts (sect. 1) that it shall be lawful for the corporation of the city of London to make a new cut or river for bringing water from certain springs to London, subject to the approval of certain commissioners, leaving the inheritance of the new cut in the owners thereof. It also enacts (sect. 2) that the corporation shall make satisfaction to the landowners, and (sect. 7) not execute their works till satisfaction is made. The second Act merely authorizes an aqueduct or pipe instead of an open cut.

Without knowing more precisely the constitution of the company, it is difficult to express an opinion on the nature of shares in it. But since they are admittedly real estate, it must be assumed that in the eye of the law the shareholders are the co-owners of the land held by the company, and the company itself is their tenant; so that, if the company were an unincorporated partnership, the real estate would not be a partnership asset. We shall notice this distinction in connection with ordinary partnerships and refer to *Forbes* v. *Steven* (L. R. 10 Eq. 178; 18 W. R. 686) and the cases there cited. It would

follow, therefore, that shares in the New River Company cannot be left by will for charitable purposes.

In *Davall* v. *The New River Company* (3 De G. & Sm. 394), where the question was whether the trustee or the Crown took them on failure of *cestui que trusts*, V.-C Knight Bruce distinctly said that they were real estate for all purposes.

Avon Navigation shares.

The view that they cannot be left to charity by will is supported by the decisions respecting shares in the River Avon Navigation.

It appears from the case of *Buckridge* v. *Ingram* (2 Ves. 651) (July 22, 1795, Sir R. P. Arden, M.R.) that an Act of the 10th Anne authorized the corporation of Bath to appoint commissioners to make and keep the river Avon navigable, with power to levy tolls and purchase lands, and other extensive powers. The corporation appointed certain commissioners accordingly, who agreed amongst themselves, by deed, to be partners in making the river navigable, and in purchasing all necessary land; and that the share of any one dying should go to his heirs and assigns. They subscribed money, purchased lands, and erected buildings accordingly. It was held that the shares in this undertaking were real estate. And in a subsequent case, namely, *Howse* v. *Chapman* (4 Ves. 542) (April 22, 1799, Lord Loughborough), it was held that a share in this undertaking could not be left by will for charitable purposes.

We are not aware whether the undertaking of the Avon Navigation Commissioners still exists with its original constitution; but if it does, it is clear that its shares cannot be left by will for charitable purposes. Presumably the same result would be arrived at with respect to New River shares, and the shares in any other kindred associations, which were made to devolve as real estate by the Acts of Parliament, under which they were constituted (see *Cadman* v. *Cadman* (L. R. 13 Eq. 470)).

The other items of real estate specified in our list appear to be clearly within the Georgian Mortmain Act, and so is the last item in the right-hand column, which is real estate also.

The only item which calls for any observation is No. 10, "the beneficial or equitable right to money or other personal estate, which is impressed with a trust for investment in land." This appears to be clearly within the words of the 3rd section above set out, both when a testator himself gives a direction for purchasing land for a charitable purpose, and also when money is already impressed with a trust for investment in land and the person to be entitled to the land could not elect to take the money in its existing state, and professes to dispose of such money for a charitable purpose. Thus, if stock in the funds has been left to trustees on trust to lay it out in purchasing land and settle such land on A. for life, and after his death on B., and B. dies before A. and before the land has been purchased, it seems clear that B. cannot leave this property for any charitable purpose. Then, as all real estate is within the Act with a possible exception of one or two unimportant items, it is customary to speak of property as being divided for the purposes of the Act into realty and impure personalty on the one hand, and pure personalty on the other. But if the personal annuities above mentioned or any shares in item 11 are not within the Act, then we may fairly coin the word impure realty to denote them, and call all other real estate pure realty; and our division will be pure realty and impure personalty for property within the Act, and pure personalty and impure realty for property not affected by it.

Proceeds of sale of land.

We ought to add at once that pure realty and impure personalty cannot be given in charity, by the device of first directing them to be sold, and then giving the proceeds in charity; nor can any charitable legacy be paid out of their proceeds, nor the legacy duty upon any charitable legacy:—

Page v. *Leapingwell* (18 Ves. 463) (Feb. 1812, M.R.); *British Museum* v. *White* (2 Si. & St. 595) (July, 1826); *Wilkinson* v. *Barber* (L. R. 14 Eq. 96) (June, 1872, Romilly, M.R., as to legacy duty).

In *Arnold* v. *Chapman* (1 Ves. Sr. 108) (July, 1748, L. C. Hardwicke) a testator devised a copyhold estate to C., he

causing to be paid to the testator's executors £1000, and he gave the residue of his estate in charity.

It was held that the testator's heir took the £1000 as real estate undisposed of.

In *Thornber* v. *Wilson* (3 Drew. 245) (April, 1855, V.-C. Kindersley) a devise of the rents and profits of certain land for seven years for a charitable purpose, was held void.

(iv.) *Pure and Impure Personalty.*

Trust to mortize distinguished.

We will now consider the question what kinds of personal estate are within the Georgian Mortmain Act. And here we will first remark with respect to the 4th prohibition contained in the Act, namely that of "money to be laid out in land, or in interests in land, or in charges upon land," that when the direction so to lay out the money is given by the very person who at the same time professes to give the property in charity, the case does not come within the question which we are considering. Such a gift is void not on account of the pre-existing nature of the property, but because it is expressed to be given for a purpose absolutely forbidden as to any property, except on compliance with the requirements of the Georgian Mortmain Act. This question is discussed in the chapter on Mortizing. If a testator has £1000 cash in his strong room, and by will he purports to give that specific property to trustees upon trust to lay it out in land and apply the rents for ever for some charitable purpose, the gift is clearly void, but we do not call the £1000 impure personalty on that account. Taking a testator's property at the time of his death, it is divisible into pure and impure personalty according to its then existing nature irrespective of any provisions which may be contained in his will. He cannot by his will affect the question.

We will now return to our list of items of personal estate, and consider whether they are pure or impure personalty, taking them one by one.

Our first and second items consist of freehold and copyhold

Leaseholds.

land held for a term of years absolute or determinable on the happening of some event; these are clearly interests in land, and they are, therefore, impure personalty:—

A.-G. v. *Tomkins* (Amb. 216) (March, 1754, Lord Hardwicke); *Middleton* v. *Spicer* (1 Bro. C. C. 201) (March, 1783, Lord Thurlow); *Johnston* v. *Swann* (3 Madd. 457) (Dec. 1818, V.-C. Leach); and many other cases.

Rights of burial.

The third item, namely, rights of exclusive burial under the Cemeteries Clauses Act, 1847, would seem to be impure personalty, but there is no decision upon it, and very likely no decision may ever be called for.

Mortgages.

Our fourth item includes mortgage debts. Where a debt is secured by a mortgage of freeholds, copyholds, or leaseholds, it is clearly a charge upon land, and therefore impure personalty:—

A.-G. v. *Meyrick* (2 Ves. Sen. 44) (Nov. 1750, Strange, M.R.); *A.-G.* v. *Caldwell* (Amb. 635) (Dec. 1766, M.R.), a case of mortgages of leaseholds; *Johnston* v. *Swann* (3 Madd. 457) (Dec. 1818, V.-C. Leach); *Chester* v. *Chester* (L. R. 12 Eq. 444) (June, 1871, V.-C. Bacon), equitable mortgages of leaseholds.

A debt secured by a deposit of deeds and a memorandum with an agreement to give legal mortgage, has also been held to be impure; and arrears of interest on a mortgage of land, due but unpaid at the creditor's death, have also been held impure (*Alexander* v. *Brame* (No. 2, 30 Beav. 153) (May, 1861, Romilly, M.R.)). And a debt secured by a deposit of title-deeds of land alone would doubtless come under the same category.

Deposit of deeds (p. 352).

But where a debt is secured by a mortgage of pure personalty, such as a reversionary interest in stock in the funds, it is not a charge upon land in any sense, and it is therefore pure personalty.

Vendor's lien.

All debts and claims in respect of which the creditor or claimant has any charge or lien upon land are likewise within the Act. For the person entitled to a charge or lien may in many cases obtain the land itself by foreclosure or other analogous proceeding (*James* v. *James* (L. R. 16 Eq. 153); *York Union Bank* v *Artley* (11 Ch. D. 205); *Tennant* v.

Trenchard (L. R. 4 Ch. App. 540, n.)); the Legislature, therefore, wishing to prevent lands from getting into the hands of charities, was forced to forbid charges upon lands to be given to charities. Hence, if a landowner has contracted to sell his land, but the purchase-money has not been all paid to him, nor the land conveyed by him at the time of his death, he cannot bequeath for charitable purposes the unpaid purchase-money. For he has a charge upon the land for such unpaid purchase-money, which charge is usually called a vendor's lien, and it may enable him to recover the land itself, in case of default of payment by the purchaser (*Harrison* v. *Harrison* (1 Russ. & My. 71); *Tennant* v. *Trenchard* (L. R. 4 Ch. App. 540, n.); *Dunn* v. *Vere* (19 W. R. 151) (15 S. J. 327); *Ex parte Barrell, In re Parnell* (L. R. 10 Ch. 512); *Watson* v. *Cox* (21 W. R. 310)).

Premium for lease.

In *Shepheard* v. *Beetham* (6 Ch. D. 597) (July 3, 1877, V.-C. Malins) a testatrix long before her death had granted a lease of a house for thirty-one years at a low rent, for a premium of £600, which had not been paid:

Held, that the unpaid premium being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity.

Charges on land.

In *A.-G.* v. *Harley* (5 Madd. 321) (May, 1821, V.-C. Leach). A testator, being entitled to several large sums charged upon land, left all his property to trustees to convert, pay debts and expenses, and certain legacies, and provide for an annuity, and hand the clear residue to his wife. The wife afterwards left the residue of her estate in charity. The sums charged upon land had not been raised or paid when the wife died. The sums charged on land were held to be impure personalty of the wife.

Mortgage of life estate and policy.

The application of these principles is well illustrated by the recent case of *In re Watts, Cornford* v. *Elliott* (27 Ch. D. 318) (June, 1884, Pearson, J.; affirmed on appeal, 29 Ch. D. 947). A testator there left in charity all his personal estate, which he could so leave. He was entitled to a sum of £100, secured by a mortgage of a life estate of M. in a sum of £3000 and a policy

of insurance upon the life of M. At the date of the mortgage to the testator and at his death the £3000 was secured on mortgage of some freehold houses, the same being an investment authorized by the terms of the trust.

Pearson, J., held that this was pure personalty, observing that the testator could not by foreclosure or otherwise acquire any interest in the land itself. He had simply the right to take the income arising from the investment. No appeal was taken on this point.

Mortgage of mixed property.

The testator was also entitled to two sums of £800 and £200. The £800 was secured on a mortgage given by a tenant for life and one of the persons entitled in remainder, of their interests under a settlement, which contained a power to invest the trust funds in real security. At the death of the testator, and also at the date of the loan, part of the trust funds was so invested and part was not. The £200 was secured on a similar mortgage by the same tenant for life, and another of the persons entitled in remainder, of their interest in the same trust fund. There were no other persons interested in the trust funds, but the Court did not consider that fact material.

It was held by Pearson, J., and affirmed by the Court of Appeal, that the sums of £800 and £200 were both charged upon land, and therefore impure. It was strongly pressed upon the Court that if the testator had bought out the interests of the mortgagees, then so much of the funds in settlement as was pure personalty would have gone to the charities, and it was urged that the sums of £800 and £200 should be apportioned over the funds on which they were secured, and that so much as corresponded to pure funds should be held pure. But the Court deliberately decided against this view, holding that a sum of money charged upon land as well as pure personalty is all impure itself.

Apportionment refused.

The Court refused to apportion the mortgage over the mortgaged properties in this case, on the authority of *Brook* v. *Badley* (L. R. 4 Eq. 106) (June, 1867, Romilly, M.R.; affirmed on appeal (L. R. 3 Ch. 672), June, 1868, Lord Cairns). There a

testator had given real and personal estate to trustees with power to convert, and a direction to pay his debts and legacies, and, after the death of his wife, to pay £3000 to H. H. sold this reversionary sum to P., and P. died before the first testator's widow, leaving her pure personalty in charity. The first testator's real estate had not been sold (L. R. 4 Eq. 107).

It was held that the £3000 was a sum of money charged on land and all impure, and that no apportionment should be made of it.

Decisions in favour of apportionment.

We find, however, that a different decision was given in a similar case in the Court below, some years after this, namely, *In re Hill's Trusts* (16 Ch. D. 173) (V.-C. Malins, Dec. 3, 1880). Here a testator left a mixed estate to trustees upon trust to convert, and invest, and pay the income to A. for life, and after her death to pay £5000 to B. B. died in A.'s lifetime, leaving all his property to A. for life, and afterwards leaving to charities such property as he could leave. The Vice-Chancellor considered that the £5000 must be apportioned over the different parts of the mixed estate, and that the part apportioned in respect of pure personalty could be left in charity. And it appears the state of the assets at the date of B.'s death was considered the material point.

This case was cited in *Cornford* v. *Elliott*, and is not expressly overruled by it, but it is difficult to reconcile this case with *Cornford* v. *Elliott* and *Brook* v. *Badley*, and if that is so, the two last-mentioned cases of course prevail. Counsel in *In re Hill's Trusts* appear to have tried to distinguish *Brook* v. *Badley* by saying that the trust to convert in that case did not arise until after the death of the tenant for life; but the Vice-Chancellor said that he could not perceive why in that case there should not have been an inquiry how much was charged upon realty and how much on personalty. He also put the case of a charitable legacy of £5000 charged upon a mixed fund comprising only £100 of realty and impure personalty, and asked why the £4900 should not be paid. There appears to be weight in this reasoning; and on principle the assets might well be applied, as

would have been done if the first testator had given the legacy in charity, in which case the mode of application will be found stated in the chapter on Marshalling Assets.

A case very like that put by the Vice-Chancellor in his judgment in *In re Hill's Trusts* seems to have come before him a few years previously, namely, *Smith* v. *Sopwith* (W. N. 1877, 208) (August, 1877). There a testator left his residue in charity, and died entitled, amongst other things, to a sum of £1600 due on a promissory note, and secured by a deposit of the title-deeds of a house. The house was worth only £800, and the Vice-Chancellor held that the excess of the debt over the value of the house was pure personalty.

Deposit of deeds.

Personal annuities.

The fifth item on our list, namely, personal annuities granted to the grantee simply, or to him, his executors, administrators, and assigns, is obviously pure personalty.

Next presentation.

The sixth item, namely, a next presentation, does not appear to have been the subject of any decision, but it would seem on principle to be an interest in land, and, as such, impure personalty.

Rent.

The seventh item contains two divisions—(1) the rent of land which accrued due in the owner's life, and (2) the apportioned part of the current rent corresponding to the number of days which the owner lived since the last day on which rent became payable. The first of these was decided to be pure personalty in *Edwards* v. *Hall* (6 De G. M. & G. 74), and the second in *Thomas* v. *Howell* (L. R. 18 Eq. 198) (March, 1874). In *Brook* v. *Badley* (L. R. 4 Eq. 106) (June, 1867, Romilly, M.R.) an instalment of mining rent, in the nature of purchase-money for minerals, which had become due before a testator died, was held to be pure personalty.

Mining rent.

In *Thomas* v. *Howell* there were also some rents, which became due before the testator's death, for leaseholds, on which some ground rents were owing; and it was held that the whole of the rents receivable were pure personalty, and that the ground rents were not specially payable out of the rents receivable, but were merely general debts.

The eighth item consists of emblements. These exist in two cases—(1) on land of which the deceased was tenant in fee, and (2) on land of which he was tenant for life. In the former case the proceeds of growing crops of wheat, oats, and rye, which are properly emblements, have been held to be impure personalty, as well as growing crops of grass and clover, which, not being annuals, are not emblements; and growing crops of trefoil were held impure also (*Symonds* v. *The Marine Society* (2 Giff. 325) (July, 1860, V.-C. Stuart)). This case affords strong ground for arguing that emblements on land, of which the deceased was tenant for life, are impure also; while an argument against this conclusion may be founded on the decision that fixtures removeable by a tenant are pure, and also on the general principle that such emblements are not an interest in land. Emblements.

The ninth item, consisting of tame animals and wild animals in captivity, is no doubt pure personalty. Such animals come under the denomination of goods and chattels; indeed, it is difficult to suppose that the word "chattels" was originally anything else than the word "cattle," which is the principal species of moveable property among all people in an elementary state of civilization. Animals.

The tenth item in our list has two branches—(*a*) the beneficial or equitable right to land impressed with a trust for conversion into money; and (*b*) real estate forming part of the assets of a partnership.

On the first branch, it is clear that if land has been left or settled on trust for sale or with a power of sale, and in the events which have happened some one person has become entitled to the whole of the proceeds, so that such person could elect to take the land in its existing state, he cannot dispose of this property for charitable purposes by will. It is impure personalty (*Cawood* v. *Thompson* (17 Jur. 798) (May, 1853, V.-C. Stuart); *Lucas* v. *Jones* (L. R. 4 Eq. 73) (V.-C. Wood, April, 1867)). It is also clear that if land is settled upon trust for sale at a future time, and the proceeds are to be divided amongst several persons, and one of such persons dies before the period Land impressed with a trust for sale.

of the sale has arrived, his interest is impure personalty (*Aspinall* v. *Bourne* (29 Beav. 462) (April, 1861, Romilly, M.R.); *Brook* v. *Badley* (L. R. 3 Ch. 672) (Lord Cairns, June 5, 1868)). The only case left is that in which the proceeds of sale are to be divided between several, and the time for the division has arrived, but the trustees have delayed the sale. Here it was formerly thought that the *cestui que trust* should not be deprived of the right of leaving his money in charity by the default of his trustee, and this is treated as being the law in the first of the two above-mentioned cases (*Lucas* v. *Jones*, *ubi suprà*).

In *Brook* v. *Badley*, however, Lord Cairns laid down the law broadly against this view, and purported to overrule the cases which were thought to support it (*Marsh* v. *Attorney-General* (2 J. & H. 61; 9 W. R. 179); *Shadbolt* v. *Thornton* (17 Sim. 49)), and his view is further supported by the earlier cases of *A.-G.* v. *Harley* (5 Madd. 321) and *Curtis* v. *Hutton* (14 Ves. 537).

It was not necessary, however, for Lord Cairns to go to this length in order to decide *Brook* v. *Badley*, but when we have to consider the second branch of our present item, we shall see that Lord Cairns' view is supported by other authorities. We pass to the second branch of our present item accordingly.

Land forming part of assets of partnership

This branch is "real estate forming part of the assets of a partnership." Our readers will probably be surprised to hear that it remained undecided until July, 1880, whether land included amongst the assets of an ordinary partnership is pure or impure personalty. There appears, however, to have been an unreported case of *Day* v. *Croft*, which is referred to in the argument in *Sparling* v. *Parker* (9 Beav. 455) before Lord Langdale (April 17, 1846), and is mentioned with approval by Lord Truro in his judgment in *Myers* v. *Perigal* (2 De G. M. & G. 607) (Nov. 15, 1851), in which, in Lord Truro's words, "certain brewers possessed considerable property in the shape of houses, and one of the partners in the brewery left his share in the partnership to charitable uses; and the devise was held to be within the Mortmain Act."

And there was also a case of *Raymond* v. *Lakeman* (16 W. R. 67)

(Nov. 1867, Romilly, M.R.), in which a contrary decision was given. It would not have been safe, however, to rely on either of these cases as an authority; for the one is unreported, and the other only shortly reported in the *Weekly Reporter*, and the distinction is very fine between real estate which is a partnership asset, and real estate of which the partners are co-owners, and on which they may even carry on their business without its being included amongst the partnership assets by the contract of partnership existing between them. The last-mentioned real estate remains real estate for all intents and purposes; it is not liable to be sold with the assets and goodwill on dissolution of the partnership; it devolves on the heir or devisee on the death of a partner, and no probate duty is payable in respect of it. Such real estate therefore cannot be left by will for any charitable purpose. For an example of the distinction here pointed out we cannot do better than refer our readers to the judgment of V.-C. James, in the case of *Forbes* v. *Steven* (L. R. 10 Eq. 178) (April 26, 1870). The judgment in that case was given in writing, and is set out in full in 18 W. R. 686.

We now return to the main question with which we are dealing. We have mentioned that there was no clear decision until July, 1880, as to whether real estate included amongst the assets of an ordinary partnership was pure or impure personalty. There were, however, many decisions to the effect that real estate included amongst the assets of those special kinds of partnerships called unincorporated companies, are pure personalty. The distinctive marks of such special partnerships are the following. The power of management and the right to exclusive possession of the partnership property is vested in a restricted number of selected individuals upon trust to carry on the business and divide the profits from time to time amongst the partners, and the shares of the partners are transferable. On a dissolution the whole of the assets would be sold, and the proceeds divided amongst the shareholders.

Shares in unincorporated companies.

The cases on this subject are the following:—

1. *Sparling* v. *Parker* (9 Beav. 450) (April 17, 1846, Lord

Langdale). Shares in the Lancaster Gas Light Company, a partnership constituted by deed dated Jan. 20, 1826, the shares to be personal estate, the deed containing a power to dissolve the partnership, sell the property, and divide the surplus :—*Held*, pure personalty.

Shares in the Harrington Dock Company, a partnership constituted by a similar deed, dated July 12, 1836 :—*Held*, pure also.

2. *Myers* v. *Perigal* (16 Sim. 533) (V.-C. Shadwell, Feb. 21, 1849). Shares in an unincorporated banking company established by deed of settlement under 7 Geo. 4, c. 46, which deed declared that the shares should be personal estate :—*Held*, to be impure, but an appeal was carried from this judgment, and heard by Lord Truro, who referred the question to the Common Law Courts (*Myers* v. *Perigal* (2 De G. M. & G. 599) (Feb. 13, 14, Nov. 15, 1851, Lord Truro).

The case was then argued before the Common Law Judges (*Myers* v. *Perigal* (11 C. B. 90)), and they certified the bequest to be legal. Finally the case came back with this certificate, and the point was re-argued before Lord St. Leonards (*Myers* v. *Perigal* (2 De G. M. & G. 615) (Dec. 1, 1852), when the shares were held to be pure personalty.

3. *Ashton* v. *Lord Langdale* (20 L. J. N. S. Ch. 234) (May 2, 1851, V.-C. Knight Bruce). Shares in the Manchester and Liverpool District Banking Company, constituted by deed of settlement, declaring the shares therein to be personal estate, but authorising the money of the Banking Company to be invested on mortgages :—*Held*, pure personalty.

4. *Hayter* v. *Tucker* (4 K. & J. 243) (Jan. 26, 1858, V.-C. Wood). Shares in several cost-book mining companies, in each of which there was a lease of a mine vested in a purser, rendering a royalty and terminable in the event of the mine not being diligently worked; the shareholders being only entitled to their share of the profits :—*Held*, pure personalty.

5. *Morris* v. *Glynn* (27 Beav. 218) (July 7, 1859, Sir J. Romilly, M.R.). Shares in the Rhymney Iron Company, a partnership

formed by deed dated Nov. 14, 1837, whereby these partners agreed to form a joint stock company for the carrying on a coal and iron trade, the business to be conducted by a board, with power to hold land and work it, but the shares to be personal estate. An Act of Parliament (4 & 5 Vict. c. 90) subsequently empowered the company to sue and be sued in the name of the secretary or any director, but did not incorporate it, and gave the governing body power to sell any of the property of the company with the consent of three-fourths of the proprietors present at any meeting. These shares were held to be impure because the main object of the company was dealing with land. But this case has been disapproved of in the subsequent case of *Entwhistle* v. *Davis*, and cannot be regarded as sound law.

6. *Entwhistle* v. *Davis* (L. R. 4 Eq. 272) (June 29, 1867, V.-C. Wood). Shares in the National Freehold Land Company established under the Act 6 & 7 Will. 4, c. 32, to raise money and lend to the members to enable them to build houses:— *Held*, pure personalty.

In the same case shares in a company described as the British Land Company, Limited, stated to be established by deed dated March 14, 1856, for the object of purchasing and improving land, which deed declared the shares to be personal estate, were held to be pure personalty; but this company was apparently incorporated.

Land included in assets of a partnership.

Now it was evidently possible to distinguish the above-mentioned cases from shares in an ordinary partnership, and this was done in *Ashworth* v. *Munn* (15 Ch. D. 363) (June, 1878, V.-C. Malins; affirmed on appeal, July, 1880). Lord Justice James there explained some expressions used in his judgment in *Attree* v. *Hawe* (9 Ch. D. 337), and notwithstanding those expressions and his opinion expressed in *Forbes* v. *Steven* (L. R. 10 Eq. 178; 18 W. R. 686), he and the other judges held that real estate included amongst the assets of a private partnership could not be left in charity. Lord Justice James pointed out that the executor of a shareholder in an unincorporated company can only sell his share or shares and apply the proceeds as part of the

testator's estate; while the executor of a member of a private partnership cannot do this, but his right is to take an account of the partnership affairs and have the assets of the partnership applied in payment of the sum due to him on taking the account, so that any land included in the assets is subject to a trust for sale and payment of the sum due. The Lords Justices expressly approved of *Brook* v. *Badley* (L. R. 3 Ch. 672), and based their decision upon it. That case may therefore be regarded as law to the full extent of the principle laid down in it. It would seem to follow from the judgments of the appeal judges in *Ashworth* v. *Munn*, and a consideration of the cases of *Brook* v. *Badley* and *Cornford* v. *Elliott* (27 Ch. D. 318, and on appeal 29 Ch. D. 947), that the share of a partner was a charge upon the assets, and that the whole would be impure, where the assets included any land. But the decision of V.-C. Malins, which was affirmed, does not appear to have gone to this length. He expressed himself that any property derived from the sale of freeholds was impure personalty, and we have seen that the same judge directed an apportionment in the case of *In re Hill's Trusts* (16 Ch. D. 173). This point appears to deserve further attention. If an apportionment had to be made, it would seem to be right to pay first the unsecured debts of the partnership out of the profits of the partnership, and call on the partners to make good any deficiency of the profits for that purpose, or divide any further profits amongst them, and then apply the assets of the partnership in making good the capital of the partners, giving rateable shares of the realty and pure and impure personalty to each rateably.

We can pass on now to item No. 11 in our list of classes of personal estate, and consider the shares of all companies except the New River Company and its cognates.

Shares in incorporated companies.

We have already disposed of shares in what are called unincorporated companies, and we have only now to deal with incorporated companies. In the first cases which arose on this head it was considered a material point that the special Act or charter incorporating the company contained a clause stating

that the shares should be personal estate; and they were then held to be pure personalty. Other cases then occurred in which no such clause was found, but the effect of the incorporating document was to make the shares personal estate, and these were also held to be pure personalty. And so when the company is formed by being registered under a general Act, which makes the shares personal estate, they are pure personalty. We may therefore say that the shares of ordinary companies are pure personalty in all cases.

The cases on the subject are the following:—

1. *Tomlinson* v. *Tomlinson* (9 Beav. 459) (July 22, 1823, Sir John Leach, M.R.). Shares in the Wisbeach Canal Company, the Shrewsbury Canal Company, and the Birmingham and Worcester Canal Company, all incorporated by Special Acts, declaring the shares to be personal estate:—All *held* impure. But no cases were cited in argument in this case, no reasons are given for the decision; and the case is inconsistent with all the other cases on the subject, and is clearly bad law.

2. *A.-G.* v. *Giles* (5 L. J. N. S. Ch. 44) (Dec. 5, 1835, Lord Langdale). Stock of East India Company:—*Held*, pure.

3. *Thompson* v. *Thompson* (1 Coll. 381) (Aug. 6, 1844, V.-C. Knight Bruce). Shares in the London Gas Light and Coke Company, incorporated:—*Held*, pure.

4. *Sparling* v. *Parker* (9 Beav. 450) (April 17, 1846, Lord Langdale). The shares in the Liverpool Gas Light Company, incorporated:—*Held*, to be pure, as well as the shares in the unincorporated companies above mentioned.

5. *Hilton* v. *Giraud* (1 De G. & Sm. 183) (March 26, 1847, V.-C. Knight Bruce). Shares or stock in the London Dock Company and the East and West India Dock Company:—*Held*, to be pure personalty.

6. *Walker* v. *Milne* (11 Beav. 507) (March 13, 1849). The shares in several incorporated companies:—*Held*, pure.

7. *Ashton* v. *Lord Langdale* (20 L. J. N. S. Ch. 234) (May 2, 1851, V.-C. Knight Bruce). In this case, besides shares in incorporated companies, some property of the kind known as

railway scrip was held to be pure personalty. Railway scrip is a document entitling the holder to an allotment of shares in a railway company in course of formation.

8. *Robinson* v. *Governours of the London Hospital* (10 Hare, 19) (Feb. 24, 1852, V.-C. Turner). Bank stock, and London Assurance Stock, left undecided pending some appeal to the House of Lords. But the appeals do not appear to have been prosecuted.

9. *In re Langham's Trusts* (10 Hare, 446) (April 23, 1853, V.-C. Turner). Shares and fractions of shares in the Oxford Canal Navigation Company, incorporated:—*Held*, pure personalty.

10. *Ware* v. *Cumberlege* (20 Beav. 503) (July 17, 1855, Sir J. Romilly, M.R.). The shares of six incorporated companies admitted to be pure, but the shares in the Grand Junction Waterworks Company, incorporated by special Act, not expressly providing that the shares should be personal estate:—*Held*, impure. But this case is inconsistent with the next case of *Edwards* v. *Hall*, and cannot be regarded as sound law.

11. *Edwards* v. *Hall* (11 Hare, 1; on appeal, 6 De G. M. & G. 74) (May 7, 1853, V.-C. Wood; Dec. 3, 1855, Lord Cranworth). This case included the shares in several incorporated companies, the shares of which were declared to be personal estate; and shares in the Grand Junction Waterworks Company, which were made personal estate by implication in the incorporating Act; and preferential stock of the Grand Junction Canal Company, such stock being created under the General Canal Act, 10 & 11 Vict. c. 94, and the Companies Clauses Consolidation Act, 1845. All were held to be pure personalty.

12. *Linley* v. *Taylor* (1 Giff. 67) (June 7, 1859, V.-C. Stuart; on appeal (8 W. R. 735), May, 1860, Lord Campbell). Shares in the Hull and Selby Railway Company, whose railway was leased for 1000 years from May 12, 1855, to the North-Eastern Railway Company, at a fixed rent of £70,000 a year, with an option of purchase:—*Held*, pure.

Debentures of companies.

The shares in companies being pure personalty, it would logically follow that any security given by a company operating only as a charge on the shareholders' interests should be pure

also. Of course if a company owned real estate, and raised money on mortgage of that real estate, so that the mortgagee might foreclose and oust the company, such a mortgage would resemble in all respects a mortgage given by an individual, and be impure. But where a company raises money on what are ordinarily called debentures, which operate only as a charge upon the profits of the company as a going concern, such debentures are little more than preference shares with a right to the repayment of the capital of them, and do not entitle the holder to interfere with the management of the company's business in any way. Such a debenture holder can only obtain a receiver of the company's income, and have the same applied, first, in payment of the company's proper expenditure, and, secondly, in satisfaction of the debenture debt. This logical result has now been arrived at, but some difficulty was occasioned and still exists owing to the similarity between the position of a debenture holder of a company owning real estate, and the owner of a bond secured on rates payable in respect of real estate, which are issued by public commissioners under statutory authority. The difficulty will be best explained by stating the cases which have been decided, in chronological order.

Bonds secured on rates.

1. *Knapp* v. *Williams* (4 Ves. 430, n.) (March 14, 1798, Lord Loughborough). A mortgage of the tolls of the Brentford Turnpike road, not including the toll-houses or gates, given under the statutes 3 Geo. 1; 10 Geo. 1, c. 6; and 11 Geo. 2, c. 6; under which the mortgagee's remedy would be to obtain the appointment of a receiver of the tolls:—*Held*, impure.

2. *Howse* v. *Chapman* (4 Ves. 542) (April 22, 1799, Lord Loughborough). Bonds of the commissioners for the improvement of the city of Bath, and bonds of the commissioners of a turnpike—the nature not being precisely stated in either case:—*Held*, impure.

Some bonds of the corporation of Bath are also mentioned in this case, and it does not clearly appear what was decided about them, but apparently they were treated as impure.

No grounds are given for the decision in this case, and no arguments upon the point appear.

3. *Finch* v. *Squire* (10 Ves. 41) (July 16, 1804, Sir W. Grant). Money lent upon the security of the poor rates and county rates, for building a gaol, under Acts of Parliament giving authority to borrow money and assign the rates to secure it. The rates being levied under the 43 Eliz. c. 2:—*Held*, impure.

But we shall see below that this case has been overruled.

4. *Walker* v. *Milne* (11 Beav. 507) (March 13, 1849, Lord Langdale). Bonds of the Birmingham and Liverpool Junction Canal Company, assigning the rates, tolls, and duties, whereby the bondholder would have been entitled to obtain the appointment of a receiver:—*Held*, pure.

5. *Ashton* v. *Lord Langdale* (20 L. J. N. S. Ch. 234) (May 2, 1851, V.-C. Knight Bruce). Railway bonds, called debentures, containing covenants to pay principal and interest, but not assigning or charging any specific property:—*Held*, pure.

Railway debentures, in the form of assignments of the undertaking and all rates, tolls, and sums of money arising by virtue of the company's Act of Parliament, and all the estate of the company, to hold the same until the sum secured should be repaid with interest:—*Held*, impure. But this latter decision is expressly overruled by the case of *Attree* v. *Hawe*, which is mentioned below.

6. *In re Langham's Trusts* (10 Hare, 446) (April 23, 1853, V.-C. Turner).

A sum of £1000 secured by an assignment of the tolls of the Oxford Canal Navigation Company, which was incorporated by Act of Parliament, with power to borrow money and assign the navigation, undertaking, premises, tolls, rates, and duties, until the sum borrowed should be repaid; all sums so borrowed to rank *pari passu*:—*Held*, impure, because the bondholder might have a receiver appointed.

7. *Thornton* v. *Kempson* (Kay, 592) (April 24, 1854, V.-C. Wood).

Sums secured by mortgages of the rates of Birmingham

granted by commissioners under Parliamentary authority, the assignment in each bond being of such proportion of the rates as the sum thereby secured bore to the whole amount borrowed: —*Held*, impure.

This case appears to be overruled by *Jervis* v. *Lawrence, infrà.*

8. *Bunting* v. *Marriott* (19 Beav. 163) (Nov. 14, 1854, Sir J. Romilly).

Bonds from the trustees of Tothill Fields improvements to secure money borrowed by them on the credit of the rates under the provisions of the 6 Geo. 4, c. cxxxiv. :—*Held*, pure. The point was not argued, and no cases were cited upon it; but this appears to be good law now.

9. *Ion* v. *Ashton* (28 Beav. 379) (June 8, 1860, Sir J. Romilly).

A sum of £1400 secured by mortgage of harbour tolls under an Act of Parliament appointing commissioners and authorizing them to improve the haven of Hedon, and take tolls and assign the tolls, rates, and duties, arising by virtue of the Act as a security for the sums borrowed :—*Held*, impure.

This case is probably overruled by *Martin* v. *Lacon, infrà.*

10. *Alexander* v. *Brame* (No. 2) (30 Beav. 153) (May 27, 1861, Sir J. Romilly).

Debentures of the Ipswich dock commissioners, who had power by Act of Parliament to purchase land, make a dock, and levy certain rates, dues, and duties on vessels entering the harbour or the dock; and to borrow money on security of the rates and duties. By the bond the commissioners assigned such proportion of the duties leviable under the Act, as the sum secured bore to the whole amount borrowed :—*Held*, impure.

This case also can hardly be distinguished from *Martin* v. *Lacon, infrà*, and is probably overruled.

11. *Cluff* v. *Cluff* (2 Ch. D. 222) (Feb. 21, 1876, V.-C. Hall). Metropolitan Consolidated Annuities :—*Held*, impure. The report does not state the nature of this property, or give any reasons for the decision, or cite any cases; but the annuities are secured in the rates of the metropolis.

This case is probably overruled by *Jervis* v. *Lawrence, infrà.*

12. *Holdsworth* v. *Davenport* (3 Ch. D. 185) (June 27, 1876, V.-C. Malins).

A debenture of the Sheffield Waterworks Company in form C. of the Companies Clauses Act, 1845, assigning the undertaking, the rents and the rates:—*Held*, pure.

13. *Chandler* v. *Howell* (4 Ch. D. 651) (Nov. 11, 1876, V.-C. Hall).

Mortgages of the Aberystwith Improvement Commissioners, which assigned such proportion of the works, rents, and rates, as the sum named in the mortgage bore to the whole sum borrowed. The works included the streets, drains, gasworks, and waterworks, and the rents included gas-rents and water-rents, and there were also rates:—*Held*, impure.

The reporter of the case of *Attree* v. *Hawe*, which is mentioned below, states in his head-note that this case is thereby overruled, but that was not pressed in argument, nor is it so mentioned in the judgment. The authority of this case must, however, be regarded as doubtful.

14. *In re Mitchell's Estate, Mitchell* v. *Moberley* (6 Ch. D. 655) (July 20, 1877, V.-C. Bacon).

A debenture of the Bridport Railway Company in the form in Schedule C. to the Companies Clauses Act, 1845 (8 Vict. c. 16) assigning the undertaking and the tolls:—*Held*, pure.

15. *Attree* v. *Hawe* (9 Ch. D. 337) (July 3, 1878, Jessel, M.R., James, Baggallay, and Bramwell, L.JJ.).

Debenture stock of the Midland and of the Great Northern Railway Companies, created under the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118):—*Held*, pure.

The last-mentioned case contains a very elaborate judgment worthy of attentive perusal, and must be considered as settling the law on this point. It expressly overrules *Ashton* v. *Lord Langdale* (No. 5 above), but it does not purport to overrule *Chandler* v. *Howell* (No. 13), though the reporter makes a statement to that effect in the head-note, and there is ground for contending that it has that effect. It also lays down the

principle that a security is not impure personalty, unless the creditor by exercising his remedies could actually get possession of some real estate and keep it till his claim was satisfied.

16. *In re Harris, Jacson* v. *Governors of Queen Anne's Bounty* (15 Ch. D. 561) (July, 1880, Jessel, M.R.). Testator gave the residue of his estate to the defendants. The residue included several bonds by justices securing sums of money on police rates under the 2 & 3 Vict. c. 93 and 3 & 4 Vict. c. 88.

Jessel, M.R., pointed out that since the Act 7 & 8 Vict. c. 33 the police rates were no longer levied by the justices but by the guardians, and that the justices could only issue a warrant to the overseers, who were personally liable, and had power to reimburse themselves by a rate. The justices, therefore, could only charge the sum which would come to their hands as money, and their bonds were pure personalty. The learned judge also quoted *Thornton* v. *Kempson* (Kay, 592) with approval, but stated that he considered *Finch* v. *Squire* (10 Ves. 41) to be overruled by *Attree* v. *Hawe* (9 Ch. D. 337).

17. *Jervis* v. *Lawrence* (22 Ch. D. 202) (Nov. 1882, V.-C. Bacon). The question here was whether certain Norland estate bonds were pure or impure personal estate. They were issued under a local Act (6 Vict. c. xxxiii.), which appointed commissioners with power to levy rates. The powers of the commissioners were transferred to the vestry of the parish by the Metropolitan Management Act, 1855. Each bond assigned a portion of the rates as a security, so that the bondholder was able to touch the rates themselves by means of a receiver.

Bacon, V.-C., observed that rates were merely recoverable by action or by distress, and were not an interest in land. He thought that the earlier decisions holding rates to be an interest in land were unauthorized extensions of the Georgian Mortmain Act, and had been overruled; and he held the bonds to be pure personalty.

18. *In re Christmas, Martin* v. *Lacon* (30 Ch. D. 544) (Aug. 1885, Chitty, J.; reversed on appeal (33 Ch. D. 332), July, 1886, C.A.). The question here was whether a bond of £400

issued by the Great Yarmouth Port and Haven Commissioners was pure or impure personalty. It was issued under the Act 5 & 6 Will. 4, c. xlix., and expressed to assign as security an aliquot portion of the dues to arise under the Act.

Chitty, J., thought that he was bound by *Knapp* v. *Williams*, and decided accordingly that the bond was impure. The Court of Appeal took a different view, and held that the tolls before them were paid in respect of vessels and goods, and were not an interest in land. They therefore held the bond to be pure. They also criticised the cases of *Knapp* v. *Williams* and *Ion* v. *Ashton*, but did not treat them as clearly overruled; but the latter case appears to be indistinguishable.

19. *Re Hatton*, *Robson* v. *Parrington* (32 Solicitor's Journal, 241) (Feb. 1888, North, J.). There were two sets of borough bonds in this case. One borough owned certain rent-charges; the other had no real estate, except such as was required for its general undertaking, and certain surplus lands of its water-works.

North, J., held the bonds of the first to be impure, and of the second pure. He considered on the first point that there was a long line of authority too strong for him to resist.

Result of the authorities.

In this state of the authorities it is clear that every security of this nature requires minute investigation, in order to see whether the bondholder, by exercising his remedies, can entitle himself to any land, or any permanent charge issuing out of land.

It may be mentioned that in *Toppin* v. *Lomas* (16 C. B. 145) (May, 1855) bonds of the Westminster Improvement Commissioners, issued under certain local Acts, were held to confer an interest in land within the meaning of the Statute of Frauds; but it does not follow that they are also within the Georgian Mortmain Act.

Debts.

We now pass on to item No. 12 in our list of personal estate (*ante*, page 341), namely, "debts in general, including the securities of foreign governments."

East India stock in 1835 was held to be pure personalty

(*A.-G.* v. *Giles* (5 L. J. N. S. Ch. 44)), and the securities of foreign governments are always pure personalty, and so are other debts except when secured by some mortgage charge or lien upon land, as we have seen above (*suprà*, Items 4 and 11), or by a judgment affecting land (*infrà*, *Collinson* v. *Pater* (2 R. & M. 344)).

A sum paid by solicitors by way of damages for negligence in negotiating a mortgage of leaseholds, has been held to be pure personalty (*Buckland* v. *Bennett* (Law Journal Notes, 1887, p. 7) (Jan. 17, 1887, Chitty, J.)).

A bond debt due from a person living when the testatrix dies, and payable to trustees to be invested in pure personalty on trust for the debtor for life, and then as the testatrix appoints, has also been held to be pure personalty (*In re Robson, Emley* v. *Davidson* (19 Ch. D. 156) (Nov. 1881, C.A.)). (See this case noticed in the chapter on Evasions of the Georgian Mortmain Act.) In giving judgment in this case, Lindley, J., commented on *Brook* v. *Badley* (L. R. 4 Ch. 672), and said, "If this debt had been a debt payable out of the assets of a person deceased before it was dedicated to charity, that case might apply."

In *Collinson* v. *Pater* (2 R. & M. 344) (Feb. 1831, Leach M.R.) a testator had entered up judgment against M. for £2315, and M. had died, and a creditor's suit had been instituted to administer his estate, and the Master had reported the judgment as an incumbrance affecting M.'s real estate. The judgment debt was held impure.

Policies of insurance.

Sums secured by policies of insurance are debts due from the societies which grant the policies, and the same are pure personalty; and this result is not affected by the fact that the policy contracts for payment out of the funds of the society, and the funds comprise real estate, or by the fact that by the terms of the policy the assured becomes a member of the society (*March* v. *A.-G.* (5 Beav. 433) (July, 1842, Lord Langdale, M.R.)).

Furniture.

The 13th item in our list of personalty is clearly pure personal estate, namely, "Furniture and moveable articles in

general, except such as are comprised in the other column;" while the other column comprises "Heirlooms, the title-deeds of land, the box containing them, its key, and the keys of doors and gates on real estate."

Ornaments. The 14th item is also pure personal estate, namely, "Ornaments (*e.g.* carpets or glasses) temporarily attached to houses (*e.g.* by nails only), but not forming part of the architectural design of the house or its essential adjuncts, as an unfurnished house." Also the tenant's fixtures on land held for years, for life, *pur autre vie*, or in right of a benefice, which are removeable by the tenant or his executors. All such are the personal estate of the person having the right of removal, and are pure personal estate (*Johnston* v. *Swan* (3 Mad. 457) (Dec. 15, 1818, V.-C. Leach)).

Fixtures.

Rights of common. The 15th item, namely, easements, rights of common, and franchises, held for a term of years, appears to be impure. Easements can only exist as appurtenant to land. Franchises and rights of common may be either appurtenant or in gross. When they are appurtenant to leasehold land, they are clearly impure, and a lease of a franchise in gross has been held to be impure also. Thus in

Franchise. *Negus* v. *Coulter* (Amb. 367) (Feb. 1759, Sir T. Clarke, M.R.) a testator was possessed of a lease from the Crown for a term of years, of the right and power of laying chains in the River Thames between Bucby's Hole and London Bridge, for mooring ships, and of all profits to arise therefrom.

This was held to be a lease of a franchise, and therefore impure personalty.

Other kinds of property. The 16th and 17th items in our list appear to be pure personalty, namely, rights of action other than for the recovery of real estate; money, stock in the funds, patents, copyrights, trade-marks, trade names, limited interests in personal estate, and ships, and shares in ships.

Estates *pur autre vie.* The last item in the right-hand column, consisting of certain estates *pur autre vie* in land, is real estate for the purpose which we are considering, and cannot be left in charity (*Aspinall* v.

Bourne (29 Beav. 462) (April, 1861, Romilly, M.R.)). We have seen, however, that when a sum of money invested on mortgage of land was vested in trustees on trust for A. for life, and B. lent A. £100 on security of A.'s life estate and a policy of insurance on his life, this £100 was held to be pure personalty (*Cornford* v. *Elliott* (27 Ch. D. 318) (June, 1884, Pearson, J.)).

CHAPTER XXVII.

On General Exceptions from the Georgian Mortmain Act.

Some general and some special exceptions have been made from the operation of the Georgian Mortmain Act, and are reproduced explicitly or by reference in the Mortmain and Charitable Uses Act, 1888.

It will be convenient to consider the general exceptions first. So far as regards testamentary dispositions, these exceptions are established by the following Acts of Parliament :—

42 Geo. 3, c. 116, s. 50 (26 June, 1802) (Land Tax);
43 Geo. 3, c. 108 (27 July, 1803) (Church Building);
6 & 7 Vict. c. 37 (New Ecclesiastical Districts);
34 Vict. c. 13 (Public Parks, Schools, and Museums).

We will consider each of these in order :—

Land Tax Act, 1802.

The statute 42 Geo. 3, c. 116 (26 June, 1802), enacts by sect. 50, as follows :—

Gift to redeem land tax on land of charity.

"And be it further enacted, that it shall be lawful for any person or persons, by will or otherwise, or any bodies politic or corporate, or companies, to give any sum or sums of money for the purpose of applying the same in the redemption of the Land Tax charged on any manors, messuages, lands, tenements, or hereditaments, settled to any charitable uses, which sum or sums may and shall be so applied accordingly; any statute of mortmain or other statute or law to the contrary notwithstanding."

And by sect. 162, as follows :—

"That every gift or disposition of any land tax, which shall have been redeemed under the provisions of the said recited

Acts, or which shall be redeemed or purchased under the provisions of this Act, made by the person or persons entitled thereto, by deed, will or otherwise, for the augmentation of any living or livings whatever, shall be valid and effectual; and such land tax shall be held and enjoyed by or for the benefit of the incumbent or incumbents for the time being of the living or livings which shall be so augmented thereby, according to the tenor of such deed, will, or instrument of gift; any statutes of mortmain or other statute or law to the contrary notwithstanding."

Devise of redeemed land tax to augment a living.

Church Building Act, 1803.

The statute 43 Geo. 3, c. 108 (27 July, 1803), after mentioning the then united Church of England and Ireland, contains an enacting clause, as follows :—

"That all and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands, or tenements, or (of) any property of or in any goods or chattels shall have full power, licence and authority at his and their will and pleasure, by deed inrolled in such manner and within such time as is directed in England by the statute made in the 27th year of the reign of King Henry the Eighth, and in Ireland by the statute made in the 10th year of the reign of King Charles the First for inrolment of bargains and sales, or by his, her, or their last will or testament in writing duly executed according to law, such deed or such will or testament being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons or body politic or corporate, and their heirs and successors respectively, all such his, her or their estate, interest, or property in such land or tenements, not exceeding five acres, or goods or chattels, or any part or parts thereof, not exceeding in value £500 for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or

Power to give five acres or £500 for church, &c.

observed, or any mansion house for the residence of any minister of the said united church officiating or to officiate in any such church or chapel, or (of) any outbuildings, offices, churchyard, or glebe, for the same respectively." The same section contains provisions for the application of the property according to the donor's directions, the consent of the ordinary being first obtained, and for its application in default of directions from the donor, with a proviso that the Act shall not enable persons within age, or of non-sane memory, nor women covert without their husbands, to make any such gift.

The second section of the Act provides that no more than one such gift or devise shall be made by any one person, and that if any such gift or devise shall exceed five acres or £500, every such gift or devise shall be valid to that extent, with power for the Lord Chancellor on petition to allot such reduced gift or devise. We conceive that this jurisdiction is included in the jurisdiction of the Court of Chancery, which is transferred to the High Court of Justice, and assigned to the Chancery Division. The Master of the Rolls always had jurisdiction to hear petitions (Harrison's Chancery, ii., 43; 3 Geo. 2, c. 30), and such jurisdiction was conferred on the Vice-Chancellors by the Acts creating those offices (53 Geo. 3, c. 24). The last-mentioned Act appears to distinguish the statutory jurisdiction of the Lord Chancellor from the jurisdiction of the Court of Chancery; but sect. 34 of the Judicature Act, 1873, appears to shew that it is included in the jurisdiction of the Court of Chancery mentioned in sect. 16 of that Act.

Section 3 of 43 Geo. 3, c. 108, provides that no glebe containing upwards of fifty acres shall be augmented with more than one acre, with like power for the Lord Chancellor to reduce any excess.

Points decided under the Act.

The following points have been established by decisions given under this Act:—

In case of a legacy of more than £500, the amount allowed will be £500, with interest at 4 per cent. from a year after the death of the testator (*Girdlestone* v. *Creed* (8 Hare, 208; 10 Hare, 480, 488), 1853).

The proceeds of the sale of land cannot be given under the statute (*Incorporated Church Building Society* v. *Coles* (1 K. & J. 145; 5 De G. M. & G. 324), 1855).

But impure personalty may be given (*Sinnett* v. *Herbert* (L. R. 7 Ch. D. 232), 1872; *Champney* v. *Davey* (11 Ch. D. 949), 1879).

The statute only authorizes a gift for a specific purpose at a specific place, and not a general gift to a society for promoting church building (*Incorporated Ch. Bg. So.* v. *Coles, suprà*).

A reservation for the benefit of the donor will not invalidate a gift under the statute (*Fisher* v. *Brierley* (1 De G. F. & Jo. 643) (1860)).

A gift of land for purposes within the Act and other purposes in undefined portions would not fail (*Semble, ibid*).

The repair of a tomb is not within the Act (*In re Rigley's Trusts* (36 L. J. Ch. 147; 15 W. R. 190), 1866).

But the repair of a churchyard is within it (*Vaughan* v. *Thomas* (33 Ch. D. 1887), 1886), and so is providing a new clock for a church (*Watson* v. *Blakeney* (35 W. R. 730), 1887).

The Act authorizes a devise by will to A., with a parol trust annexed for A. to apply the devised land for the purposes of the Act (*O'Brien* v. *Tyssen* (28 Ch. D. 372), 1884).

A married woman is still unable to make a gift under the Act without her husband's concurrence (*Clements* v. *Ward* (35 Ch. D. 589), 1887).

A gift of land for the incumbents of a church, so long as all the pews are free, is not within the Act (*Randell* v. *Dixon* (38 Ch. D. 213), 1888).

The following is a chronological list of the cases:— Digest of cases.

In the *Church Building Society* v. *Barlow* (3 De G. M. & G. 120) this statute was merely incidentally mentioned.

In *Dixon* v. *Butler* (3 Y. & C. 677) (Dec. 1839, Alderson, B.) there was a legacy of £500 to be applied in paying for the building of a church at A., if the inhabitants of A. built one within seven years, which they did. The gift was held good either under the Act 43 Geo. 3, c. 108, or independently of it.

Girdlestone v. *Creed* (8 Hare, 208; 10 Hare, 480, 488) (Feb. 1853). Testatrix gave the residue of her estate to the fund for building and endowing a church at S. There was no existing site for such a church, so that this was admitted to be a trust involving the purchase of land under the Georgian Mortmain Act; but it was held to be good to the extent of £500 under the Act 43 Geo. 3, c. 108. The Court therefore directed £500, with interest at 4 per cent. from a year after the death of the testatrix, to be invested and set apart, and ordered an inquiry whether there were any means of applying the fund so carried over in or towards building or endowing a church at S.

The *Incorporated Church Building Society* v. *Coles* (1 K. & J. 145) (Dec. 1854, V.-C. Wood; on appeal (5 De G. M. & G. 324), May, 1855, L. C. Cranworth). Testator devised two houses to trustees on trust to sell them and invest the proceeds in Government securities, and pay the dividends to his wife for life, and at her death transfer the principal "to the treasurer for the time being of the Incorporated Society for Promoting the Enlargement, Building, and Repairing of Churches and Chapels, to be applied to the uses and purposes of that society."

Proceeds of sale.

General purpose.

The plaintiffs claimed that this gift was good under the statute 43 Geo. 3, c. 108, or at least that it was good to the extent of £500. The Court considered that the plaintiffs established that their purposes were covered by the statute. But both the Vice-Chancellor and the Lord Chancellor held (1) that the proceeds of the sale of land could not be given under the statute, and (2) that the statute only authorized a gift for a specific purpose, at a specific place, and not a general gift for the general purposes of the Act.

The Vice-Chancellor (1 K. & J. 155) also expressed an opinion that a gift of land under the Act must be without any reservation; but this point was not affirmed by the Lord Chancellor, and it has since been disapproved of by a judge in the Court of Appeal (*Fisher* v. *Brierley* (1 De G. F. & Jo. 643; see p. 664, cited *infrà*)).

This statute was discussed in *Fisher* v. *Brierley* (1 De G. F. & Jo.

643) (May, 1860, L.JJ. Knight Bruce and Turner.) There a lady had conveyed two acres of land to trustees as a site for a church, parsonage, and school. The deed had been enrolled under the Georgian Mortmain Act, and the lady lived several years longer, and left money by will to build and endow the church and school, and build the parsonage. The Master of the Rolls had held that the evidence established a secret trust for the grantor for life, and that the deed was void under the Georgian Mortmain Act on that account, and was not supported by the Acts 43 Geo. 3, c. 108, and 4 & 5 Vict. c. 38. The Court of Appeal reversed the decree on the first point, but L. J. Turner (p. 664) also expressed an opinion on the second point as follows:—"With respect to his Honour's judgment, and what appears to have fallen from Sir W. Page Wood upon the same point, I cannot agree. (See *Incorporated Church Building Society* v. *Coles* (1 K. & J. p. 155) . . . . This statute is not, as I read it, a statute merely conferring a Parliamentary power. It is, as I understand it, a statute having for its object the removal of a disability in the owners of land to give them to the charitable purposes specified in the statute, and if the disability be removed as to all the estate and interest, it seems to me that it must be removed as to every portion of it, as to an estate in remainder or reversion no less than as to an estate in possession. It cannot, I think, possibly be denied that under this Act the donor could devise the land for the purposes mentioned in the statute. He could enjoy the land therefore during his life, and give it by will at his death to the charitable purposes. Could it be intended that he should be at liberty to do this, and yet should not be at liberty to settle the land on himself for life and afterwards for the charitable purposes? Again, there is nothing which I can find in the statute pointing to a reservation in favour of the donor only, and if the construction put upon the Act by the Court below be correct, no owner in fee could give less than the fee, and no termor could give less than his whole term. No disposition less than the fee, or the whole term would satisfy the words 'all his estate and interest.' Looking

Reservations allowed.

to these words and to the plain object and purposes of the statute, I should most respectfully differ from the Master of the Rolls on this point also, if it was necessary to decide it. A further point was also attempted to be raised in the argument of this case, with reference to the portions of the land devoted to the church and the school being undefined in the deed; but in the view which we have taken of this case it becomes unnecessary, I think, to come to any decision upon this point. I may add, however, that the argument did not by any means satisfy me that there was any difficulty in the question."

In *In re Rigley's Trusts* (36 L. J. Ch. 147) (15 W. R. 190) (Nov. 1866) V.-C. Kindersley decided that the repair of a tomb did not come within the Act 43 Geo. 3, c. 108, and this decision has never been questioned (see *Vaughan* v. *Thomas* (33 Ch. D. 193)).

Pratt v. *Harvey* (L. R. 12 Eq. 544) (July, 1871, V.-C. Wickens). A testator gave £1000 to aid the building of a church already commenced at M., and another £1000 towards building an entirely new church at N., adding that if the last-mentioned church should not be commenced in his lifetime or within two years after his death, or if it should not be erected within half a mile of N., the second legacy should not be payable.

The first legacy was clearly good independently of the Church Building Act, and the second was held good to the extent of £500 under that Act.

In *Sinnett* v. *Herbert* (L. R. 7 Ch. 232) (1872) there was a gift of residue towards erecting or endowing a new church; and it was held that £500 of impure personalty could be left for either erecting or endowing a new church under the Act 43 Geo. 3, c. 108 (see the case stated in the chapter on Remoteness).

Impure personalty.

In *Champney* v. *Davey* (11 Ch. D. 949) (Feb. 1879), which will be found stated in the chapter on Effect of Failure, a sum of £2000 was given out of a mixed fund of pure and impure per-

sonalty for restoring and improving a church, parsonage house, and school.

An opinion was expressed that the £2000, or so much of it as should be found to be properly applicable under some inquiries which were directed, would be considered as payable rateably out of the pure and impure parts of the fund; and would be paid, as to the proportion of the pure, in full; and as to the proportion of the impure, up to £500, that amount being authorized by the Act 43 Geo. 3, c. 108.

In *O'Brien* v. *Tyssen* (28 Ch. D. 372) (Dec. 1884, V.-C. Bacon) a testator had built a church upon his own land, and by will executed several years before his death he left all his property to his wife. The plaintiff alleged that the testator confided to his wife a secret trust to have the church consecrated; and he contended that this rendered the devise void, and he claimed the church as heir-at-law of the testator. The testator's communications to his wife about the church appear to have taken definite shape within the last three months of his life. It was held that, assuming the secret trust to have existed, it was rendered valid by the Act 43 Geo. 3, c. 108.

Secret trust.

It appears to be difficult to reconcile this decision with principle. Notice of appeal was given, but the case was compromised on terms leaving the decision to stand.

In *Vaughan* v. *Thomas* (33 Ch. D. 187) (June, 1886) Mr. Justice North held that the making or repair of a churchyard came within the Act 43 Geo. 3, c. 108, but he further held such an object to be a charity on general principles.

In *Watson* v. *Blakeney* (35 W. R. 730) (April, 1887, North, J.) a gift of £200 for providing a new clock for a church was held payable out of impure personalty under the Act 43 Geo. 3, c. 108.

Clements v. *Ward* (35 Ch. D. 589) (April, 1887, Stirling, J.). A married woman by will gave several charitable legacies, one being "to the vicar and churchwardens for the time being of S., the sum of £300, such sum to be applied by them in the erection of a new church." She added: "I direct that the said

Married woman.

several legacies shall be paid free from legacy duty out of that part of my personal estate which is legally applicable for that purpose."

The vicar and churchwardens of S. admitted that this legacy was void under the Georgian Mortmain Act, but they contended that the Married Women's Property Act, 1882, had the effect of repealing the proviso at the end of the Act 43 Geo. 3, c. 108, so far as it affected married women, and that the legacy was consequently valid under the last-mentioned Act.

Stirling, J., held, however, that this contention failed, and the legacy was void.

Randell v. *Dixon* (38 Ch. D. 213) (Feb. 1888, North, J.). A testatrix devised a close of land containing about three acres to trustees in fee for the benefit of the district church at H., upon the same trusts and conditions as those respecting a sum of £14,000 thereby bequeathed. The trusts and conditions were to pay the income to the incumbent for the time being so long as all the pews were free; but if ever any pew rent should be taken, then on trust for her representatives.

Trust while pews all free.

It was held that the three acres had not been devised for a glebe under the Act 43 Geo. 3, c. 108, and the devise was therefore void.

New Ecclesiastical Districts Act, 1843.

The Act 6 & 7 Vict. c. 37 (28th July, 1843) enables the Ecclesiastical Commissioners to form new ecclesiastical districts, to be converted into new parishes on the consecration of a church, and provides for the appointment of ministers for them, to be converted into perpetual curates on the like event; and then enacts, in effect, in sect. 22, that every person shall have power by will to give to the Ecclesiastical Commissioners his lands, goods, and chattels, or any part or parts thereof for the endowment or augmentation of the income of such ministers or perpetual curates, or providing any church or chapel for the purposes of the Act.

A point under this Act arose in *Baldwin* v. *Baldwin* (No. 2)

(22 Beav. 419) (July, 1856, Romilly, M.R.). There a testator gave £8000 out of his pure personalty to be held in abeyance and accumulated for twenty-one years or until the powers of the Act should be exercised at B., and then to be paid to the Ecclesiastical Commissioners towards providing and endowing a church at B.

It was held that a prospective gift of this nature was valid.

Public Parks, Schools, and Museums Act, 1871.

The statute 34 Vict. c. 13 (25th May, 1871) is called the Public Parks, Schools, and Museums Act, 1871.

It does not extend to Scotland or Ireland (sect. 2).

It begins by defining the terms, public park, elementary school, school-house, and public museum, and then enacts as follows :—

"4. From and after the passing of this Act all gifts and assurances of land of any tenure, and whether made by deed or by will or codicil, for the purposes only of a public park, a school-house for an elementary school, or a public museum, and all bequests of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only, shall be valid notwithstanding the statute of the 9 Geo. 2, c. 36, and other statutes commonly known as the Statutes of Mortmain.

"5. Provided that every will or codicil containing any such gift or assurance and every deed containing any such gift or assurance and made otherwise than for full and valuable consideration, shall, in order to enable such gift or assurance to take effect under this Act, be made twelve calendar months at least before the death of the testator or grantor, and shall be enrolled in the books of the Charity Commissioners within six calendar months next after the time when the same will, codicil, or deed shall come into operation.

"6. Nothing in this Act shall authorize any gift by will or codicil of more than twenty acres of land for any one public park, or of more than two acres of land for any one public

museum, or of more than one acre of land for any one schoolhouse.

"7. Nothing in this Act contained shall invalidate, or impose any restriction or condition upon, any gift or assurance which would have been valid and free from such restriction or condition if this Act had not been passed."

It will be seen that this Act is repealed by the Mortmain and Charitable Uses Act, 1888, but that its provisions are reproduced by that Act, with an additional provision allowing a devise by any will being a reproduction in substance of a devise made in a previous will which was in force at the time of such reproduction, and was executed twelve months before the death of the testator.

The other statutes which have been noticed in this chapter are not mentioned in the Mortmain and Charitable Uses Act, 1888, but we conceive that they are preserved by the 8th section of that Act.

CHAPTER XXVIII.

On Special Exemptions from the Georgian Mortmain Act.

Exemptions in the Act.

The Universities, the Colleges in them, and the Three Old Public Schools.

It will be seen that the Georgian Mortmain Act itself contains (sect. 4) a special exemption of gifts "to or in trust for either of the two Universities within that part of Great Britain called England (*i.e.* Oxford and Cambridge), or any of the colleges or houses of learning within either of the said Universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster."

The provisions of the Georgian Mortmain Act in this respect are reproduced in the 7th section of the Mortmain and Charitable Uses Act, 1888, with the further exemption of the Universities of London and Durham, and Victoria University, and all the colleges or houses of learning within them, and a special mention of Keble College.

The 5th section of the Georgian Mortmain Act limited the number of advowsons which might be held by any college, but this section was repealed by the Act 45 Geo. 3, c. 101, as to colleges in the Universities, leaving it only applicable to Eton, Winchester, and Westminster.

Several decisions have been given on the subject of devises to colleges in the Universities. The cases are as follows:—

A.-G. v. *Tancred* (1 Eden, 10) (Amb. 351) (1 Bl. Rep. 90)

(Nov. 1757, Lord Keeper Henley). A testator devised land to the masters of Christ and Caius Colleges, the treasurer of Lincoln's Inn, and four other like officials and their successors on trust to pay the profits equally between twelve students already instituted by him, four at each of the colleges, and four at Lincoln's Inn; and added, that if the Mortmain Act should prevent the dispositions of his land, then he devised the premises to the thirteen fellows of Christ's, and the fellows of Caius, and the scholars of both colleges:

Held, that the legal estate could not be limited to the officials named, but that did not invalidate the trusts; that the trusts for the four students at each of the colleges were good under the Georgian Mortmain Act, but the trust for the four students at Lincoln's Inn was void, and the income released by failure of the last trust went under the ultimate gift to the fellows and scholars of the two colleges.

In *A.-G.* v. *Munby* (1 Mer. 327) (March, 1816, Grant, M.R.) a point was raised under this section. The rector of G. had by deed conveyed £3000, secured on mortgage of land, to the Master and Fellows of Trinity College, Cambridge, on trust to pay the income for ever to the rectors of G. He died within twelve months devising the advowson to the same trustees.

It was held (1) that the gift by deed to a college for non-collegiate purposes was avoided by death within twelve months; and (2) that the devise of the advowson did not validate the prior gift of the £3000. The devise of the advowson was assumed to be good.

While discussing devises to colleges we may mention the case of *A.-G.* v. *Whorwood* (1 Ves. Sen. 533), which will be found stated in the chapter on Learning and Humanitarian Gifts; but it seems that the will in that case was prior to the Georgian Mortmain Act (*ante*, pp. 172, 173).

Question as to new colleges.

In 3 Ves. 728, in a note to *A.-G.* v. *Bowyer* (March, 1798), we read: "It was said in the argument that a new college is not within the proviso in the Act; and that Lord Northington had said the legislature intended to throw nothing in the way of

devises to the Universities, or to colleges already established there; meaning that there should be no new establishment; but that the colleges already there should be better endowed. The Lord Chancellor expressed his doubts of that distinction."

In a recent debate in the House of Commons the idea appears to have prevailed that colleges founded since the Georgian Mortmain Act were not exempt from it (1888).

Effect of Crown Charters.

An exemption from an Act of Parliament can only be granted by another Act of Parliament. The Crown alone cannot grant such an exemption, unless authorized so to do by Parliament. Now, the Crown has been authorized by Parliament to grant exemptions from the old Plantagenet Mortmain Acts, namely, by the Act 7 & 8 Will. 3, c. 37; but the Crown has never been authorized to grant exemptions from the Georgian Mortmain Act. The power to grant exemptions from Acts of Parliament was one of the privileges which the kings of the House of Stuart tried to usurp; and this pretended right was expressly negatived by the Bill of Rights, which was drawn up and embodied in our statute law after the Revolution of 1688 (1 W. & M. st. 2, c. 2, ss. 1, 2).

Hence a clause in a Crown charter purporting to authorize a corporation to acquire land only operates as a licence under the Act 7 & 8 Will. 3, c. 37, and does not in any way oust the operation of the Georgian Mortmain Act.

On this subject reference is frequently made to the case of *Robinson* v. *Governors of the London Hospital* (10 Hare, 19) (June, 1852, V.-C. Turner). In that case the charity had only a Crown charter, which could not dispense with the Georgian Mortmain Act, and indeed expressly required its provisions to be complied with. The charter authorized the corporation to purchase, have, take, hold, receive, and enjoy lands up to the value of £4000 per annum, and all manner of goods and chattels, and further authorized all persons to give, grant, sell, alien, assign, devise, bequeath, or dispose of the same to the corpora-

tion, in any manner not repugnant to the Georgian Mortmain Act. The judgment contains some comments on this charter; and it shews that a double power for a corporation to take lands and for other persons to give lands may be subject to the Georgian Mortmain Act, even though the word "devise" is introduced in the latter power, and is apparently incapable of operating.

A legacy to the Governesses' Benevolent Institution appears to have been allowed to be paid out of impure personalty in *In re Bradley, Oldershaw* v. *The Governesses' Benevolent Institution* (June 8, 1887), although that institution was merely incorporated by a Crown charter. But this was doubtless done by inadvertence, and the case is not to be found in any reports except those of the *Times* (vol. iii. p. 668). In other cases charities with Crown charters have been held disentitled to any exemption from the Georgian Mortmain Act, and the point has been considered to be too clear for reporting or even arguing. A case of *Goodrich* v. *Harper* was so treated before Chitty, J., on June 30, 1887.

Effect of Private Acts and Local and Personal Acts.

Private Acts.

It becomes necessary also to say a few words respecting Acts of Parliament. These are of three classes: (1) Public General Acts, (2) Private Acts, and (3) Local Acts formerly called Local and Personal Acts. Private Acts include any Acts giving powers for the development of settled estates. These generally contain a clause saving the rights of all persons except the settlor and those claiming under him. They are generally printed by the King's or Queen's printer, and contain a clause making a copy so printed evidence of the Act. They are not embodied in any official published collection of statutes. A clause in such an Act purporting to grant exemption from a general Act of Parliament, or rule of law, would have no effect whatever. Inclosure Acts were also included amongst private Acts, but many of them were not printed at all, or only printed unofficially. They appear, however, to have a general effect like local and personal Acts.

Local Acts.

Local Acts are really public Acts which bind all subjects of the Crown. But they happen only to concern the inhabitants of some particular locality, or the persons connected with some particular institution. Hence it has been found convenient to separate them from the general body of Public General Statutes; but in order to prevent any mistake as to their character, a custom was adopted at the date of their separation, to insert in each a clause in the following words: "And be it further enacted, that this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded." In the year 1850, however, the Act 13 Vict. c. 21, s. 7, provided that every Act made thereafter should be deemed and taken to be a public Act, and be judicially taken notice of as such, unless the contrary should be expressly provided and declared by such Act.

Local Acts separated.

The date of the separation of Local Acts from Public General Acts was 1798. Since that date the Local Acts have been published complete in a separate official volume, and numbered from (i) onwards in small Roman numerals, while the Public General Statutes have been numbered with Arabic numerals. Prior to 1798, the Local Acts were included amongst the Public General Acts, and numbered with Arabic numerals, like the other Public General Acts. Furthermore, some of the Local Acts were printed in full among the Public General Acts, while only the titles were given of others. There was, however, during the 18th century a separate collection of Local Acts published by the King's printers, but even this did not give them all in full; and there are some such Acts of this period of which the title only can be readily found, and it may be impossible to say where any complete copy of the Act is preserved or whether it exists at all.

Acts incorporating charitable institutions are sometimes printed in full with the Public General Acts and sometimes treated as Local Acts, and it will be seen by the references hereinafter given, that some are to be found in one of the collections above-mentioned, and some in another. A Local Act, however,

is a public Act; and a clause in it dispensing with any prior Act of Parliament has that effect, if it is clear that such is the intention. But the intention must be clearly expressed (*Luckraft* v. *Pridham* (6 Ch. D. 205, *infrà*)).

We can proceed now to consider the special Acts granting exemptions from the Georgian Mortmain Act, so far as the testamentary power is concerned.

Queen Anne's Bounty.

By the Act 2 & 3 Anne, c. 11, Queen Anne was authorized to create a corporation for the augmentation of benefices of the Established Church, and to vest in it certain perquisites previously enjoyed by the Crown. Such a corporation was created accordingly, and bears the name of Queen Anne's Bounty.

The 4th section of this statute enacts that:—

"All and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency, of or in any lands, tenements, and hereditaments, or any property of or in any goods or chattels, shall have full power, licence, and authority, at his, her, and their will and pleasure, by deed inrolled, in such manner and within such time as is directed by the statute made in the 27th year of the reign of King Henry the Eighth, for inrolment of bargains and sales, or by his, her, or their last will or testament in writing, duly executed according to law, to give and grant to, and vest in the said corporation and their successors, all such his, her or their estate, interest, or property in such lands, tenements, and hereditaments, goods and chattels, or any part or parts thereof, for and towards the augmentation of the maintenance of such ministers as aforesaid, officiating in such church or chapel, where the liturgy and rights [*sic*, for 'rites' probably] of the said church are or shall be so used or observed as aforesaid, and having no settled competent provision belonging to the same, and to be for that purpose applied according to the will of the said benefactor, in and by such deed inrolled, or by such will or testament, executed as aforesaid, expressed: And in default of

such direction, limitation or appointment, in such manner as by Her Majesty's letters patent shall be directed and appointed as aforesaid; and such corporation and their successors shall have full capacity and ability to purchase, receive, take, hold and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or alien to the said corporation any manors, lands, tenements, goods or chattels, without any licence or writ of *ad quod damnum;* the Statute of Mortmain or any other statute or law to the contrary notwithstanding.

"5. Provided always, that this Act or anything therein contained shall not extend to enable any person or persons, being within age, or of non-sane memory, or women covert, without their husbands, to make any such gift, grant or alienation; anything in this Act contained to the contrary in any wise notwithstanding."

As this statute was passed in 1703, many years before the Georgian Mortmain Act, it was of course superseded by the latter Act, and only relieved from the penalties of the old Plantagenet Mortmain Acts, and supplemented the then existing Wills Act, under which a devise to a corporation was in general void at law (see the chapter on Devises to Corporations).

A devise to Queen Anne's bounty was therefore void under the Georgian Mortmain Act. And, indeed, as the rules of that corporation prescribed that all their funds should be invested in the purchase of land, it was held that even a legacy of pure personalty to the corporation was void (see *Widmore* v. *Woodroffe* (Amb. 636 (1766); S.C. 1 Bro. C. C. 13, 33, n.), and *Middleton* v. *Clitherow* (3 Ves. 734) (1788)). The governors of Queen Anne's Bounty, however, very naturally altered their rules so as to avoid a repetition of the last-mentioned decisions; and a few years later they procured an Act of Parliament granting them an exemption from the Georgian Mortmain Act, namely, the statute 43 Geo. 3, c. 107 (July 27, 1803).

This statute, after reciting the 4th and 5th sections of the

Act 2 & 3 Anne, c. 11, and that the operation thereof had been retarded by the Act 9 Geo. 2, c. 36, proceeds to enact:—

"That so much of the said Act of her late Majesty Queen Anne, as is herein recited, shall be and remain in full force and effect, the said Act of his late Majesty King George the Second, or any other Act or law to the contrary notwithstanding."

It will be observed that this still leaves the wills of married women subject to the Georgian Mortmain Act in respect of gifts to Queen Anne's Bounty. It might also be thought arguable that money to arise from the sale of land is subject to the same law (see the case under the Church Building Act, 43 Geo. 3, c. 108 (*ante*, p. 373)); but it has been assumed, as was there held also, that Queen Anne's Bounty can take impure personalty (*Jacson* v. *Governors of Queen Anne's Bounty* (15 Ch. D. 561) (July, 1880)); and the same has been held with respect to hospitals with special statutory powers, as will be mentioned below.

Guardians of Poor of Plymouth (not exempt).

In contrast with the case of Queen Anne's Bounty there may be placed the case of the Guardians of the Poor of Plymouth (*Luckraft* v. *Pridham* (6 Ch. D. 205) (July, 1877, C. A., affirming Hall, V.-C.)). There the guardians were empowered to take land by devise, by an Act prior to the Georgian Mortmain Act, and they had three later Acts extending their first Act and re-enacting it with the extensions. It was held that such a re-enactment did not exempt them from the Georgian Mortmain Act, as the later Acts did not manifest any clear intention so to do.

The British Museum.

The present British Museum Act (5 Geo. 4, c. 39, May 17, 1824) enacts by its 3rd section as follows:—

"And be it further enacted, that the trustees of the British Museum shall, for the purposes of the several Acts relating to the same, and for the enlargement, improvement, and better endowment of the said museum, and for any purposes connected

with the said museum, have full power, capacity, and ability, to purchase, take, hold, and enjoy any lands, tenements, and hereditaments, and to accept any gifts, grants, devises, and bequests of lands, tenements, and hereditaments, and of any interest therein, and of any money issuing out of, or charged upon, or to arise from the sale of, lands, tenements and hereditaments of and to any value and amount whatever; the Statutes of Mortmain or any other statute or law to the contrary thereof in any wise notwithstanding."

Prior to this Act the rights of the trustees of the British Museum were regulated by the Act 26 Geo. 2, c. 22, which, by s. 14, enacted that they should be a body corporate, adding "and shall also have full power, capacity, and ability to purchase, take, hold, and enjoy, for the purposes of this Act, as well goods and chattels as lands, tenements and hereditaments, so as the yearly value of such lands shall not exceed £500 above all charges and reprises, the Statute of Mortmain or any other statute and law to the contrary thereof in any wise notwithstanding."

A decision under this Act will be found in the case of *The Trustees of the British Museum* v. *White* (2 Sim. & Stu. 594) (July, 1826, V.-C. Leach). There a will, which evidently came into operation before the British Museum Act, 1824, left a freehold estate to trustees on trust to sell it and pay the proceeds to the trustees of the British Museum. The gift was held void under the Georgian Mortmain Act. The result would evidently be different under a will coming into operation after the British Museum Act, 1824.

The Seaman's Hospital Society.

The statute 3 & 4 Will. 4, c. 9 (6th May, 1833), incorporates a certain society called "The Seaman's Hospital Society," with power to purchase lands of an annual value not exceeding £12,000, and the 2nd section is in the following words:—

"And be it further enacted, that it shall and may be lawful to and for any person or persons, bodies politic or corporate,

their heirs and successors, respectively, to give, grant, sell, alien, assign, devise, bequeath or dispose of, in mortmain, in perpetuity, or otherwise, to or to the use and benefit of, or in trust for, the said society and their successors, any manors, messuages, lands, tenements, rents, annuities, and hereditaments, whatsoever, not exceeding the yearly value of £12,000 above all charges and reprises, and any sum or sums of money to any amount, and any ships, goods, or chattels, of whatever value, for the charitable purposes of the said society; all which gifts, grants, conveyances, assignments, bequests, and dispositions, the said society are hereby authorized and enabled to receive, accept, and hold."

The Royal Naval Asylum.

By the Royal Naval Asylum Act, 1811 (51 Geo. 3, c. 105, 26th June, 1811), it was enacted as follows:—

"That it shall and may be lawful for any person or persons whomsoever to give, devise, or bequeath any messuages, lands, tenements or hereditaments to and for the use and benefit of the Royal Naval Asylum," and the Act proceeds to authorize the commissioners of the asylum to hold and manage the same.

Greenwich Hospital.

By the Greenwich Hospital Act, 1829 (10 Geo. 4, c. 25, May 22, 1829), it is, in sect. 27, enacted as follows:—

"That it shall be lawful for any person or persons whomsoever, having power so to do, to give, devise, or bequeath any messuages, lands, tenements, or hereditaments, goods, monies, chattels, and effects to and for the use or benefit of Greenwich Hospital;" and the section proceeds to give the commissioners of the hospital power to hold and deal with the same.

St. George's Hospital.

By the Act 4 Will. 4, c. 38 (16th June, 1834) the President, Vice-Presidents, Treasurers, and Governors of St. George's Hospital are incorporated with powers similar to those in the

Westminster Hospital Act, the limit of lands being £20,000 per annum.

The words of the Westminster Hospital Act will be found set out below, and it will be seen that a decision upon it has been given, to the effect that it constitutes an exemption from the Georgian Mortmain Act.

A similar decision with respect to both these hospitals was given in *Broadbent* v. *Barrow* (31 Ch. D. 113) (Nov. 1885, Pearson, J.), which will also be found stated below. And another decision as to both hospitals was given in *Wigg* v. *Nicholl* (L. R. 14 Eq. 92) (May, 1872, Romilly, M.R.). It was there held that both hospitals could take impure personalty, and this view is supported by the expressions used in the other modern cases. A decision was at the same time given on the mode of marshalling assets under a gift of pure and impure personalty to these hospitals and other non-exempted charities, with a marshalling clause added. See the chapter on Marshalling Assets.

St. George's Hospital and Westminster Hospital were also considered entitled to take impure personalty in *In re Pitt's Estate, Lacy* v. *Stone* (1885) (33 W. R. 653), also stated in the chapter on Marshalling Assets.

Westminster Hospital.

By the Westminster Hospital Act, 1836 (6 & 7 Will. 4, c. xx., 19th May, 1836), the President, Vice-Presidents, Treasurers, and Governors of Westminster Hospital were incorporated by that name, and the 1st section proceeds as follows:—

"And by the same name shall be able and capable, without incurring the penalties and forfeitures of the Statutes of Mortmain, to hold and retain for the purposes of the said hospital, the said hospital or building in and near the Broad Sanctuary aforesaid and piece of ground there whereon the same stands, and the piece or pieces of land or ground in James Street, aforesaid, and by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain for the purposes of the said hospital, any

manors, messuages, lands, tenements, and hereditaments, of any kind, name, quality, or sort, either in fee or for terms of life or years, or otherwise howsoever, so as such manors, messuages, lands, tenements, and hereditaments (exclusive of the said hospital at or near the Broad Sanctuary aforesaid and piece or parcel of ground whereon the same stands, and exclusive of the said pieces or parcels of ground in James Street aforesaid, and also exclusive of the manors, messuages, lands, tenements, and hereditaments, that may at any time or times after the passing of this Act be vested in the said corporation hereby created, or in any trustee or trustees for the said corporation hereby created by way of mortgage, or upon which any sum or sums of money belonging to the said corporation hereby created may be charged) do not in the whole exceed the clear yearly value of £20,000 over and above all charges and reprises, computing the same at the rack-rent, which might have been had or gotten for the same respectively at the time of the attaining or acquisition thereof: And also by will, gift, purchase, or otherwise, to obtain, acquire, hold and maintain for the purposes of the said hospital any kind of personal estate, and any moneys and property of what nature or kind soever, including money secured on mortgage of, or charged upon, any manors, messuages, lands, tenements, or hereditaments."

An argument on the effect of this Act took place in *Perring* v. *Trail* (L. R. 18 Eq. 88) (April, 1874). There a testator gave his real and personal estate to trustees in trust to convert it into money and thereunto pay, amongst other things, a legacy of £100 to the treasurer of the Westminster Hospital, for the purposes of the institution. The report tells us that V.-C. Malins held that the Act enabled any person to devise land for the benefit of the hospital, and the head-note rules that the legacy was payable in full. The reference to the special Act is wrongly given in the report as 6 Geo. 4, c. xx., instead of 6 & 7 Will. 4, c. xx.

The case of *Broadbent* v. *Barrow* (31 Ch. D. 113) (Nov. 1885, Pearson, J.) was as follows :—

A testator gave some pecuniary charitable legacies, and

directed them to be paid out of his pure personalty; and as to the ultimate residue of his estate, or such part or parts thereof as might be lawfully appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as his trustees in their uncontrolled discretion should think fit. The trustees selected St. George's Hospital and the Westminster Hospital.

The question was argued whether, under the terms of the will, these hospitals could take so much of the residue as represented real estate. The limits named in their special Acts were not liable to be transgressed thereby.

It was held that they could take it.

We shall comment on this case at the end of this chapter.

University College.

By the Act 32 & 33 Vict. c. xxiii., University College, London, of which the hospital is part, was re-incorporated with new powers, and the 6th section enacted as follows:—

"All persons, bodies politic and corporate, otherwise competent, may grant, sell, alien, and convey, devise, and bequeath to the use of or in trust for the said college any messuages, lands, tenements, or hereditaments of any tenure, or any estate or interest therein (subject to the above-mentioned limitations as to the total value of the messuages, lands, tenements, or hereditaments which the said college is hereby empowered to hold), or any money subject to be laid out in land, or other personal estate savouring of the realty, any law or statute prohibiting the conveyance or devise of lands or other property in mortmain or for charitable uses notwithstanding."

The limit of land appears to be that the yearly rack-rent value at the time of acquisition should not exceed £10,000.

In the case of *In re Bradley, Oldershaw* v. *Governesses' Benevolent Institution* (*Times* Reports, vol. iii. p. 668, June, 1887) it was held by Kay, J., that impure personalty might be bequeathed to University College Hospital under this Act.

The Bath Hospital.

This hospital was originally incorporated by the Act 12 Geo. 2, c. 31. On turning to the king's printers' edition, the material words of this Act will be found to be:—

"And that they and their successors by the name aforesaid shall be able and capable in law to have, hold, receive, enjoy, possess, and retain to them and their successors, in trust for and for the benefit of the said charity, all such sum and sums of money as have been contributed and raised as aforesaid, or shall at any time or times hereafter be raised and contributed, given, devised, or bequeathed by any charitable and well-disposed persons, to and for the charitable ends and purposes in this Act mentioned; and that they and their successors, by the name aforesaid, shall and may at any time hereafter, without licence in mortmain, purchase, take, or receive any lands, tenements, or hereditaments, or any estate or interest arising or derived out of the same, so that the said lands, tenements, or hereditaments, or any estate or interest arising or derived out of the same, exceed not in the whole the annual rent or value of £1000 over and above all reprises."

A decision under this statute was given in *Mogg* v. *Hodges* (1 Cox 9; 2 Ves. Sr. 52) (Nov. 1750, L. C. Hardwicke). The question raised was whether the hospital could take money arising from real estate devised to be sold. The Lord Chancellor laid down that the construction of a charter contained in an Act of Parliament must be the same as that of a Crown charter; and held that the clause authorizing them to take all moneys whatsoever must mean such as were given according to the general rules of law; and that the clause authorizing them to take land was only inserted to avoid the trouble of applying for a licence in mortmain.

Some twenty-nine years after this decision the hospital procured a further Act, namely, 19 Geo. 3, c. 23 (1779), of which the title alone appears in the ordinary editions of the statutes, and is as follows:—

"An Act more effectually to enable the president and governors of the hospital or infirmary at Bath, established by an Act passed in the 12th year of his late Majesty King George the 2nd, intituled an Act for establishing and well governing an hospital or infirmary in the city of Bath, to take or acquire, and hold, any lands, tenements, or hereditaments, and any money or personal property to be laid out in lands, tenements, or hereditaments, pursuant to any will, or otherwise, to the amount limited in the said Act."

On turning to the king's printers' edition of this Act, it will be seen that it effects the object stated in the title in very full and express words. It was evidently drawn by a skilled draftsman. It expressly authorizes gifts of land by will or deed, or any sums of money charged on or issuing out of lands, or any personal estate to be laid out in land, whether in possession, or reversion, notwithstanding the Georgian Mortmain Act. But it provides that the total value of the land to be held shall not exceed £1000 per annum.

Under this Act, a gift by will of the proceeds of sale of land to the Bath Hospital was held good in *Makcham* v. *Hooper* (4 Br. C. C. 153) (1792), by Lord Commissioner Ashurst. And another decision to the same effect was given in *Blann* v. *Bell* (7 Ch. D. 382) (Nov. 1877, V.-C. Hall). It appears from the report of the last-mentioned case that the gift therein made still left the limit of £1000 a year unattained.

The Magdalen Hospital (*not exempt*).

This hospital is incorporated by the 9 Geo. 3, c. 31, of which only the title is given in the ordinary editions of the statutes. It is treated in Shelford on Mortmain, p. 256, as creating an exemption from the Georgian Mortmain Act. But on turning to the king's printers' edition of the statutes, the words of this Act will be found to be:—

"And that they, by the name aforesaid, shall be able and capable in law to have, hold, receive, enjoy, possess, and retain to them and their successors, in trust for and for the benefit of

the said hospital, all such sum and sums of money, as have been paid, or shall at any time or times hereafter be paid, given, devised, or bequeathed, by any charitable or well-disposed persons, to and for the charitable ends and purposes in this Act mentioned; and that they, by the name aforesaid, shall and may at any time hereafter, without licence in mortmain, purchase, take, or receive, any lands, tenements, or hereditaments, or any estate or interest, arising or derived out of any lands, tenements, or hereditaments for the purposes aforesaid."

It appears to be clear that this does not create any exemption from the Georgian Mortmain Act. The words are very similar to those in the first Act relating to the Bath Hospital, which were held not to create an exemption.

The Foundling Hospital (*not exempt*).

This hospital is incorporated by the 13 Geo. 2, c. 29, of which only the title is given in the ordinary editions of the statutes. It is stated in Tudor on Charities, p. 97, to create an exemption from the Georgian Mortmain Act. But on turning to the king's printers' edition of the Local and Personal Acts, it will be seen that this Act only gives the corporation power to purchase land up to the value of £4000 a year.

School for Indigent Blind and Female Orphan Asylum (*not exempt*).

Nettersole v. *The School for the Indigent Blind* (L. R. 11 Eq. 1) (Nov. 1870, Romilly, M.R).

The question in this case was whether the defendant corporation, and a kindred corporation called the Female Orphan Asylum, could take bequests of impure personalty.

The School for the Indigent Blind was incorporated by a local and personal Act, containing the usual clause declaring it to be a public Act, namely, the Act 7 Geo. 4, c. lxviii. (May 5, 1826). This Act further enacted that "the corporators should be able and capable in law to have, hold, receive, enjoy, possess, and retain, for the purposes of the Act and in trust for the benefit of the

institution, all such sum and sums of money as had been paid, given, devised, or bequeathed, or should at any time or times thereafter be paid, given, devised, or bequeathed, by any charitable or well-disposed person or persons to and for the charitable purposes and ends in the Act mentioned; and that they and their successors, by the name aforesaid, might at any time or times thereafter purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, or hereditaments, in the whole not exceeding two acres, for any estate or interest whatsoever, for the purposes of the said charity, without incurring any of the penalties or forfeitures of the Statutes of Mortmain."

It was held that the corporation could not take a bequest of impure personalty. A similar decision had been arrived at in a case of *Chester* v. *Chester* by V.-C. Wood (Feb. 25, 1867), where a bequest of leaseholds to the same corporation was held void. And the question was re-argued with the same result before V.-C. Bacon, on the further consideration of *Chester* v. *Chester* (L. R. 12 Eq. 444) (June, 1871). On the last occasion some reliance was placed on some clauses in later Acts authorizing the funds of the corporation to be invested on mortgage, and the material parts of the Act incorporating the Female Orphan Asylum will be found set out (39 & 40 Geo. 3, c. lx.).

We will now state the result of this chapter in a tabular form :—

Statutes which exempt.	Charities exempted.	Remarks.
Georgian Mortmain Act. 9 Geo. 2, c. 36, s. 4. And Act of 1888.	The Universities of Oxford and Cambridge and Colleges in them, and the scholars of Eton, Winchester, and Westminster.	*Quære*—whether this extends to future colleges.
Mortmain Act, 1888. 51 & 52 Vict. c. 42.	Durham, London, and Victoria Universities, and colleges in them.	The like *quære*.
19 Geo. 3, c. 23.	Bath Hospital (later Act).	£1000 per annum limit.
43 Geo. 3, c. 107.	Queen Anne's Bounty.	Not applicable to wills of married women.

Statutes which exempt.	Charities exempted.	Remarks.
51 Geo. 3, c. 105.	Royal Naval Asylum.	
5 Geo. 4, c. 39.	British Museum (later Act).	
10 Geo. 4, c. 25.	Greenwich Hospital.	
3 & 4 Will. 4, c. 9.	Seaman's Hospital Society.	£12,000 per annum limit.
4 Will. 4, c. 38.	St. George's Hospital.	£20,000 per annum limit: *Broadbent* v. *Barrow*, 31 Ch. D. 113.
6 & 7 Will. 4, c. xx.	Westminster Hospital.	£20,000 per annum limit: *Broadbent* v. *Barrow*, 31 Ch. D. 113; *Perring* v. *Trail*, L. R. 18 Eq. 88.
32 & 33 Vict. c. xxiii.	University College, London.	£10,000 per annum limit.

It is possible that there may be other Acts of Parliament exempting charities which have escaped notice because they have not been brought before the attention of the law courts or any of the text-writers on this subject.

Acts which do not exempt.	Charities.	Remarks.
Plymouth Guardians Acts, confirming Act prior to Georgian Mortmain Act.	Plymouth Guardians.	*Luckraft* v. *Pridham*, 6 Ch. D. 205.
12 Geo. 2, c. 31.	Bath Hospital under earlier Act.	*Mogg* v. *Hodges*, 1 Cox, 9; 2 Ves. Sen. 52.
13 Geo. 2, c. 29.	Foundling Hospital.	
26 Geo. 2, c. 22.	British Museum under earlier Act.	*Trustees of B. M.* v. *White*, 2 Sim. & Stu. 594.
9 Geo. 3, c. 31.	Magdalen Hospital.	
39 & 40 Geo. 3, c. lx.	Female Orphan Asylum.	*Nethersole* v. *School for Indigent Blind*, L. R. 11 Eq. 1.
7 Geo. 4, c. lxviii.	School for Indigent Blind.	Ditto.

It will be seen that the case of *Broadbent* v. *Barrow* (31 Ch. D. 113) (Nov. 1885), which has been stated above, involved a decision that under the words which were there found, a gift of real estate to charitable purposes to be selected by A., was good, because A. might select objects capable of taking real estate. The words in that will were very special, however, and it is remarkable that no cases were there cited upon this point, although two recent cases might have been found, one telling one way and one the other. The first of these is

Lewis v. *Allenby* (L. R. 10 Eq. 668) (July 26, 1870, V.-C. Stuart). Testator gave to trustees all the residue of his personal estate upon trust to realize the same "and pay and divide the proceeds of such realization in such parts, shares and proportions, and in such manner and form, amongst any hospitals or other charitable institutions situate in London or elsewhere in England, and whether the proposed objects of their bounty shall have been instituted for similar or different purposes as they in their sole and uncontrolled discretion shall think proper."

The estate included some items which were considered to be impure personalty:

Held, that the trustees might select charities which were exempt from the Georgian Mortmain Act to be recipients of the impure personalty, and so the whole gift was good.

And the other is *In re Clark, Husband* v. *Martin* (W. N. 1885, 59) (33 W. R. 516) (March, 1885, Kay, J.).

There a testatrix, by will made in 1878, gave the ultimate residue of her property to her executors "to give it to the poor as they may think fit."

The residue comprised both pure and impure personalty.

Kay, J., distinguished *Lewis* v. *Allenby* on the ground that the trust there pointed to hospitals, of which there were several which could take land. And he declined to stretch the point to this case, although he agreed that an appointment to a hospital might be made under the words in the will. He ordered the debts, legacies, and costs to be paid out of the pure and impure personalty rateably.

On this point reference may also be made to *Luckraft* v. *Pridham* (6 Ch. D. 205) (July, 1877, C. A.), where a testator gave half of the proceeds of his real and personal estate to the different charities of Plymouth, the amounts and the charities to be in the discretion of his trustees. It will be seen that an inquiry was directed whether any and which of the charities of Plymouth were capable of taking by will the proceeds of land or impure personalty to any extent, and what extent. But the result of the inquiry will be seen to be that no charity was so capable.

Ancient Monuments.

The Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73) (August 18, 1882), applies to certain ancient monuments in Great Britain and Ireland, specified in the schedule thereto, and enacts by sect. 4 that "Any person may by deed or will give, devise, or bequeath to the Commissioners of Works all such estate and interest in any ancient monument to which this Act applies as he may be seised or possessed of, and it shall be lawful for the Commissioners of Works to accept such gift, devise, or bequest, if they think it expedient so to do."

The Mortmain Act, 1888.

It appears to us that the effect of the Mortmain and Charitable Uses Act, 1888, on the exemptions from the Georgian Mortmain Act, established by subsequent statutes, is to leave the law unaffected by reason of the 8th section of that Act. But if University College, London, is a college or house of learning within the University of London, the limit of £10,000 per annum imposed with respect to it, would seem to be removed. But we believe that it is constituted as an independent body.

CHAPTER XXIX.

On Attempted Evasions of the Georgian Mortmain Act.

Secret Trusts.

Many cases have occurred in which testators have sought to evade the Georgian Mortmain Act by devising land to one or more persons absolutely, so that no trust has appeared on the face of the will; but the testator has left some record of his intentions, so as to endeavour to bind the devisees in honour to carry out his wishes. In these cases it has been established, that if the testator has not communicated his intention to any of the devisees during his life, they can claim the property absolutely under his will, and are not affected by any declaration of trust made by the testator by verbal directions to others, or by any writing not executed as a will and admissible to probate (*Addlington* v. *Cann* (1744) (3 Atk. 141); *Lomax* v. *Ripley* (1855) (3 Sm. & Giff. 48); *Wallgrave* v. *Tebbs* (1855) (2 K. & J. 313); *Tee* v. *Ferris* (1856) (2 K. & J. 357); *Jones* v. *Badley* (1866) (on appeal, L. R. 3 Ch. 362); *Rowbotham* v. *Dunnett* (1878) (8 Ch. D. 430)). The case of *Boson* v. *Statham* (1 Eden, 508) must be regarded as bad law in 1760, and it certainly is not law now. But if a devisee or legatee has promised to deal with property in such manner as the testator may thereafter direct, and the testator gives a direction by an unattested document not communicated to the devisee or legatee, the latter is a trustee of the property for the representatives of the testator (*Boyes* v. *Carritt* (1884) (26 Ch. D. 53)).

If trust not communicated.

Gift on trust not expressed.

Secondly, if the testator has communicated his intention to a devisee, either before making his will or afterwards, and the devisee has by words or by silence led the testator to believe

Communication and assent or silence.

that he will carry out his intention, then, if the trust is a lawful trust, which would have been valid if inserted in the will, the devisee may be compelled to perform it. Many cases have occurred of private trusts which have been enforced under these circumstances, and charitable trusts of pure personalty come under the same principle (*Tee* v. *Ferris* (1856) (2 K. & J. 357); *Russell* v. *Jackson* (1852) (10 Hare, 204)); and so do charitable trusts of land for purposes excepted out of the Georgian Mortmain Act (*O'Brien* v. *Tyssen* (1884) (28 Ch. D. 372). But under similar circumstances trusts of realty and impure personalty for charitable purposes, not excepted out of the Act, fail altogether, and the property may be claimed by the testator's heir, next of kin, residuary devisee, or residuary legatee, according to the circumstances (*Edwards* v. *Pike* (1759) (1 Eden, 267); *Bishop* v. *Talbot* (1772) (stated 6 Ves. 60); *Strickland* v. *Aldridge* (1804) (9 Ves. 516); *Russell* v. *Jackson* (1852) (10 Hare, 204); *Tee* v. *Ferris* (1856) (2 K. & J. 357); *Moss* v. *Cooper* (1861) (1 J. & H. 352); *Springett* v. *Jennings* (1870) (L. R. 10 Eq. 488)).

Assent purposely withheld.

Thirdly, if the testator is advised as to the law of secret trusts, he may manage to sail very near the wind; the mode in which this may be done will be seen on referring to the cases of *Lomax* v. *Ripley* (1855) (3 Sm. & Giff. 48), and *Rowbotham* v. *Dunnett* (1878) (8 Ch. D. 430), the principal points of which will be found stated below. See also *Carter* v. *Green* (1857) (3 K. & J. 591).

Communication by third party.

Fourthly, the effect of a communication of the testator's wishes to a devisee by a third party will be found discussed in *Moss* v. *Cooper* (1861) (3 J. & H. 352). The judge there drew a distinction between communication by the testator's authority and without it. It would seem to be more material to consider whether the testator knew of the communication, and let his will stand in consequence of the express or tacit acceptance of the trust by the devisee.

Fifthly, a case of some difficulty is presented when a devise is made to two or more persons, and the testator communicates his intention to one or more, but not to all of them. In such cases,

when the devise is made to two or more as tenants in common, and the communication is made after the date of the will, it has been held that the devisees, to whom no communication is made, take the property unaffected by any trust (*Tee* v. *Ferris* (1856) (2 K. & J. 357)). But when the devise is made to two or more as joint tenants, and the communication of the intention to one devisee, and his acceptance of the trust, have taken place before the will was executed, it has been held that the whole devise was affected by the trust, and was consequently void in equity (*Russell* v. *Jackson* (1852) (10 Hare, 204); *Springett* v. *Jennings* (1870) (L. R. 10 Eq. 488)). On these authorities some judges have considered that the distinction lies between a devise to two or more as tenants in common, and a devise to two or more as joint tenants (*Jones* v. *Badley* (1866) (L. R. 3 Eq. 635, reversed on appeal, L. R. 3 Ch. 362); *Springett* v. *Jennings* (1870) (L. R. 10 Eq. 488); *Rowbotham* v. *Dunnett* (1878) (8 Ch. D. 430)); while other judges have considered that the distinction lies between a devise made to A. and B. on the faith of a promise made by A. alone, and a devise to A. and B. without any prior promise by any one, and a subsequent promise made by one of them (*Russell* v. *Jackson* (1852) (10 Hare, 204); *Tee* v. *Ferris* (1856) (2 K. & J. 357); *Moss* v. *Cooper* (1861) (1 J. & H. 352)). The former view is most countenanced by text-writers, and would probably prevail in a Court of first instance. But it is not unlikely that the Court of Appeal would take the latter view. Indeed it is possible to conceive that the Court of Appeal might even go farther and hold that in no case should a devisee be deprived of the benefit of a devise by any communication made to, or promise given by, another person.

Communication to one of several.

Several other points have been decided in cases of this nature:—

Other points decided.

(1.) A devisee may be compelled to answer on oath as to whether any communication was made to him, or any secret trust undertaken (*Bishop* v. *Talbot* (1772) (6 Ves. 60); *Muckleston* v. *Brown* (1801) (6 Ves. 52); *Strickland* v. *Aldridge* (1804) (9 Ves. 516)).

(2.) The testator's solicitor may also be compelled to give evidence; and no claim can be set up to withhold his evidence, on the ground that the communications between him and the testator were privileged (*Russell* v. *Jackson* (1851) (9 Hare, 387)).

(3.) If a secret trust is established as affecting a gift, and the devisee claims that it does not affect the whole gift, the onus lies on the devisee of proving to what extent the gift is free from the trust (*Russell* v. *Jackson* (1852) (10 Hare, 204)).

Legal estate.

(4.) It is clear that the devise of the legal estate of freeholds by the will is effectual, but the devisee is held to be a trustee of the beneficial interest for the heir-at-law or residuary devisee (*Sweeting* v. *Sweeting* (1864) (12 W. R. 239)). Some cases contain expressions which might at first sight seem to imply that the devise was void as to the legal estate. But if that were so, the plaintiffs ought to have proceeded at law before the Judicature Act, as in the case of a devise upon a charitable trust expressed in the will (*Doe* v. *Wrigate* (1819) (2 B. & Ald. 710)).

Digest of cases.

The following are the cases arranged chronologically:—

Addlington v. *Cann* (3 Atk. 141) (July, 1744, Lord Hardwicke). A testator devised real estate to A. and B. as joint tenants in fee, and he left a paper subsequently signed by him, but not attested as a will of lands, indicating an intention that his real estate should be applied for charitable purposes. It appeared on the evidence that the testator never communicated his charitable intention to either A. or B. The heir-at-law claimed the land.

It was held that A. and B. took beneficially under the will, and that the subsequent document was altogether inoperative. As it was not properly attested, and no communication was made to the devisees, no charitable trust could have been enforced against them prior to the Georgian Mortmain Act, and there was nothing for that Act to operate upon. The Lord Chancellor thought the case a hard one, and dismissed the bill without costs.

Edwards v. *Pike* (1 Eden, 267) (March, 1759, Lord Keeper). Testatrix devised certain freehold property to her two nieces, M. and C., and asked them to promise, in the presence of two witnesses, that they would convey the property upon certain charitable trusts. They both denied that they made any promise, but it was proved that one promised and the other remained silent; and they did in fact convey the property upon the charitable trusts, soon after the death of the testatrix:

Held, that the heir-at-law was entitled to have the property conveyed to him. The expression is used that the devise was void, but that evidently means void only in equity.

Boson v. *Statham* (1 Eden, 508) (Nov. 1760, Lord Keeper). In this case a testator devised all his real estates to the defendant and two others, and the heirs of the survivor, and gave his personal estate to his executor; and by a separate document, signed but not executed as a will of lands, he directed his real estate to be employed for a charitable purpose, and his personal estate to be laid out in land for a like purpose.

The devise and bequest were both declared void, without going into the question whether the trust was communicated to the trustees or not. Apparently the document declaring the trust was sufficiently executed to operate as a will of personal estate, but that fact was not relied on. The judgment turns on the principle "that a writing signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses, according to the solemnities of the Statute of Frauds." But this is not law now, and is inconsistent with other authorities as to the state of the law then.

Bishop v. *Talbot* (stated 6 Ves. 60) (Feb. 1772, Sir T. Sewell). A devise of real estate to two as joint tenants in fee. The heir-at-law filed a bill alleging a secret trust for charity. The defendants were compelled to answer as to the secret trust; and the Court held their answer to amount to a disclaimer of any beneficial interest, and declared that there was a resulting trust for the heir-at-law.

Muckleston v. *Brown* (6 Ves. 52) (May, 1801, Lord Eldon). Bill by the co-heirs-at-law of H. against his devisees, charging that the testator requested the devisees to apply his real estate for charitable purposes, and that they undertook to do so. The bill, according to the practice at that date, included a number of interrogatories, and prayed, amongst other things, that the defendants might be ordered to answer them. The defendants demurred.

The Lord Chancellor held that they must answer the interrogatories. He said (p. 69): "Surely the law will not permit secret agreements to evade what upon grounds of public policy is established."

Strickland v. *Aldridge* (9 Ves. 516) (June, 1804, Lord Eldon).

This was a bill by an heir-at-law against a devisee, charging that the devisee promised the testator that if the land were devised to him he would use it for a charitable purpose, and that the testator devised it in reliance on that promise. The devisee tried to set up the Statute of Frauds by means of a plea; but this defence was defeated, the plea being ordered to stand for an answer with liberty to the plaintiff to except, according to the practice then prevailing.

The Lord Chancellor said: "In *Addlington* v. *Cann* Lord Hardwicke was clearly of opinion that, there being nothing in the will attaching a trust, if the testator afterwards by an unattested paper, expressing his own intention, not communicated, said the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed, and the subsequent paper was not well executed. But that is perfectly different from the case of a devisor expressing in the paper a trust which, by a contract with the devisee, led to that devise."

Paine v. *Hall* (18 Ves. 475) (Feb. 1812, Lord Eldon).

In this case a bill by an heir against a devisee, alleging a secret charitable trust, failed for want of evidence of any such trust. The Lord Chancellor said: "There is no evidence of a

trust expressed, nor of such an engagement by words, or by silence, as would authorize the Court to say that the devisees undertook to do that which prevented the devisor from imposing it upon them as a trust." The bill was dismissed with costs.

Burney v. *Macdonald* (15 Sim. 6) (July, 1845, V.-C. Shadwell).

This is a very unsatisfactory case. A testator devised freeholds and leaseholds to four persons during the life of M., an alien, in trust to retain the rents to their own use during such life. He told three of them that he wished the rents to be paid to M. during his life, and they wrote letters promising to do this. The Vice-Chancellor held that these letters were not binding, and that the four devisees took the rents free from any trust during the life of M. He also refused to allow any costs to the Attorney-General, who was made a party to the suit.

Russell v. *Jackson* (9 Hare, 387) (Dec. 1851, V.-C. Turner). On a bill by the next of kin against the executors, who were also residuary legatees, claiming that the gift to the defendants was tainted with a secret illegal trust, the testator's solicitor was compelled to give evidence. The defendants were not allowed to set up any privilege, inasmuch as the plaintiffs also claimed under the testator; and, moreover, no privilege could be claimed to conceal an illegal purpose.

Russell v. *Jackson* (10 Hare, 204) (March, 1852, V.-C. Turner). Testator gave the residue of his estate, including the proceeds of realty, to his executors, W. and T., expressing it to be as a testimony of his regard and esteem for them, and as a compensation for the trouble they would have in the execution of his will. Really he wished them to found a Socialist school for teaching the system of one Robert Owen, and the judge considered that it was proved that he communicated this intention to them before making his will, and said he was satisfied that they would carry out his intentions; but one of them denied that any communication was made to him.

The Vice-Chancellor considered, that if they had stated that

they would not carry out the testator's intentions, he would not leave left them the property, and they were fixed with a trust accordingly: and that the case was the same if the communication was made to only one of them, as it was clear that the gift was made on the faith of the assent of that one to the testator's wishes. The Vice-Chancellor also considered that the burden lay on the defendants of shewing that the trust did not affect the whole residue, if they contended that such was the case. The trust was void as to the realty and impure personalty, whether the object were charitable or illegal; and an inquiry was directed as to the teaching of Robert Owen in order to settle the devolution of the pure personalty.

The Vice-Chancellor stated in this case that he fully agreed to the principles laid down in *Huguenin* v. *Baseley* (14 Ves. 289), that no person can claim an interest under a fraud committed by another; and he considered the case to come under that principle, if the intention was only communicated to one of the devisees.

Lomax v. *Ripley* (3 Sm. & Giff. 48) (Feb. 1855, V.-C. Stuart). Testator by will gave the residue of his estate to his wife, and left a letter, which was not communicated to her, saying that he wished her to keep £1500 a year and certain specific property and bestow the rest in charity. She admitted that she knew that he intended to leave her that amount and wished the rest to be devoted to charity; but it was proved that he purposely abstained from telling her that he had left the whole to her, lest the doctrine of a secret trust should be brought in, and she thought that he could and would carry out his charitable intention himself. A bill by the testator's nieces claiming the property as being given on a secret illegal trust was dismissed with costs.

Wallgrave v. *Tebbs* (2 K. & J. 313) (Dec. 14, 1855, V.-C. Wood).

Testator gave to T. and M., as joint tenants, £12,000 free from legacy duty. He also devised certain freehold lands at Chelsea and Earl's Court to T. and M., their heirs and assigns for ever, as joint tenants. The will contained a residuary devise and

bequest. The residuary devisees and legatees claimed both the land and money given to T. and M., on the ground that the testator intended the money to be laid out upon the land, in building a church and almshouses, and endowing them. T. and M. admitted that the testator intended the property, or at least the bulk of it, to be applied for charitable purposes, and that he had selected them as persons interested in charitable and religious objects, knowing one personally and the other by character, with that degree of confidence which a knowledge of character enables a donor to have, as to the probable application or use of a gift. They admitted also that they considered it would be proper for them to apply the property accordingly, and that they had discussed schemes between themselves and with other persons, for building a church at Chelsea and other matters. But it was proved that the testator had not communicated his intention to either of them during his life, and his intention was only shewn by the evidence of his solicitor and an unsigned document prepared by the testator's direction:

Held, that T. and M. took the money and land absolutely free from any trust whatever. And the bill was dismissed with costs. The judgment contains a full disquisition on the law.

Tee v. *Ferris* (2 K. & J. 357) (Feb. 1856, V.-C. Wood).

Testator by will and codicil gave the ultimate residue of the proceeds of sale of his real and personal estate to F. and D. and three other persons as tenants in common, and appointed them executors, with a clause forfeiting the shares of any who should decline to prove. At the same time he signed a letter requesting that the property so given might be applied for charitable purposes.

Sixteen months after, on the day of his death, F., at the testator's request, summoned his solicitor to make a further codicil, and the solicitor then read to the testator the original will and codicil and the letter in F.'s presence, and prepared a further codicil, which the testator executed. D. renounced probate, but F. and the three others proved. The three

others knew nothing of the testator's dispositions until after his death:

Held, that the three others took the property given to them free from any trust; but that the share given to F. was affected with a charitable trust, which was void as to the proceeds of realty and impure personalty, and the testator's heir-at-law and next of kin respectively were entitled to the same.

The Vice-Chancellor distinguished *Russell* v. *Jackson* (10 Hare, 204) as being a case in which one of two devisees procured a devise to be made to himself and another.

In *Carter* v. *Green* (3 K. & J. 591) (July, 1857, V.-C. Wood) there was a legacy to four persons upon a charitable trust, followed by a codicil saying that if the trust was void he gave the property to the same four persons as joint tenants, free from any trust or condition whatever, expressed or implied. The Vice-Chancellor expressed an opinion that the second gift would be perfectly good, if the first was not so, but he held the first gift to be valid, so that the question as to the second did not really arise.

Gift over on failure.

Moss v. *Cooper* (1 J. & H. 352) (Feb. 1861, V.-C. Wood).

Testator gave a number of charitable legacies out of his pure personalty, and thereby exhausted it, and then gave the residue of his estate, consisting of realty and impure personalty, on trust for G., S., and O. in equal shares.

The testator wished the residue to be applied for certain charitable purposes and informed G. of the same. G. wrote down the testator's wishes and communicated them to S. and O. S. told the testator on one occasion that he would carry out his wishes, but O. never mentioned the subject to the testator, though he saw him at times, nor did the testator speak to O. upon it. G. died before the testator. The heir-at-law and next of kin claimed the residue. S. died during the suit:

Held, that G. must be presumed to have communicated the testator's wishes to S. and O. by the testator's authority, and that the case was the same as if the testator himself had communicated them; and that S. by word of mouth, and O. by

silence, had made the testator believe that they would carry out his wishes; and the heir-at-law and next of kin were entitled to the property.

In the course of the judgment his Honour said: "The only material distinction between a will made on the faith of a previous promise and a will followed by a promise is this: if on the faith of a promise by A. a gift is made in favour of A. and B., the promise is fastened on the gift to both, for B. cannot profit by A.'s fraud. But if the will is first made in favour of A. and B., and the secret trust is then communicated only to A., the gift will be fixed with a trust with respect to A., but not so as regards B.; because in this case the gift to B. is not obtained by the procurement of A., and is not tainted with any fraud in procuring the execution of the will."

Sweeting v. *Sweeting* (12 W. R. 239) (Dec. 1864, V.-C. Kindersley).

In this case a testator devised land to A. for life and then to B. B. died devising all his land to C. on certain trusts for D. and E. It was admitted that B. was affected with a secret trust for a charity; and no heir of the original testator could be found. C. filed a bill against the Crown and the beneficiaries under B.'s will.

It was held that the legal estate passed to B., and from him to C., and that there was a resulting trust for the heir of the original testator, and an inquiry was directed as to who was such heir.

Jones v. *Badley* (L. R. 3 Eq. 635) (January, 1866, Romilly, M.R.; on appeal, L. R. 3 Ch. 362, Lord Cairns). A testatrix gave the residue of her realty and impure personalty to John B. and James his son, as joint tenants, and she gave the residue of her pure personalty to found a certain charity. It was proved to be her wish that the realty and impure personalty should be applied for charitable purposes, but it was clear that she made no communication on this point to James B. Lord Romilly, however, held on the evidence that she communicated her intention to John B. and that he acquiesced in it, and made

a decree in favour of the heir-at-law and next of kin of the testatrix. This was reversed on appeal on the ground that no communication to John B. was proved.

The question whether a communication to one devisee would affect the other, does not appear to have been very carefully considered in this case; nor the distinction taken in *Moss* v. *Cooper*, between a promise before the will and a subsequent promise. Lord Romilly, however, stated that he considered that the testatrix communicated to John B. the contents of her will, meaning therefore a subsequent communication.

Springett v. *Jennings* (L. R. 10 Eq. 488) (June, 1870, Romilly, M.R.) A testatrix by deed conveyed land to three trustees to be the site of an almshouse, and directed a sum of £3000 to be laid out in building it. The deed was enrolled, but she died within twelve months after executing it. By will she left the same land to two of the trustees, and a third person as joint tenants. It was proved that she wished the devisees to carry out the trusts of the deed and had had frequent conversations on the subject with one of them, who was also a trustee of the deed, and believed he would carry out her wishes. It is not stated whether there were any conversations before the will, but probably there were. This was held to vitiate the devise. The words used in the report look as if the judge treated the devise as being void at law, but his attention was not called to that point. This is a clear case in which a trust fixed upon one of several joint tenants vitiated the devise to them all; but this point does not appear to have been argued.

Gift of rest of land not residuary.

Another point decided in this case was that the co-heiresses of the testatrix took the land, although the will contained a devise of the rest of the testatrix's land in the same parish.

On this last point an appeal was taken, but the judgment was affirmed (*Springett* v. *Jennings* (L. R. 6 Ch. 333) (February, 1871, L.JJ.)).

Rowbotham v. *Dunnett* (8 Ch. D. 430) (March, 1878, V.-C. Malins). A testatrix wished to leave all her property in charity, but her solicitor explained the law to her about secret trusts.

She thereupon got him to make a will leaving her pure personalty in charity, and her impure personalty and the proceeds of her realty to him and M. in equal shares, for their own respective use and benefit. On the same day she signed a paper prepared by the solicitor, saying, "I have made this bequest to enable D. and M., if they think fit, but not otherwise, to benefit the funds of certain public institutions in which they are aware I take an interest, but I hereby expressly declare that I have not imposed any secret trust or confidence upon the said D. and M. in regard to such institutions, nor have they or either of them given me any express promise or assent to devote the whole or any portion of the moneys so bequeathed to them for the benefit of such public institutions or any of them, and I declare that with regard to the application of the moneys so bequeathed to the said D. and M., it is my wish and intention that they should have the most entire and uncontrolled discretion, and I have made this declaration for the purpose of explaining fully my intentions with regard to such bequest in case any of my relations should call the same in question, and to shew that I am fully aware of the disposition I have made, and that there is no legal obligation on the part of the said D. and M. or either of them to apply any part of the moneys bequeathed to them otherwise than as mentioned in my said will."

M. knew nothing of the will until after the testatrix died.

The Vice-Chancellor considered it clear that M. was not affected by the communication made to D., as they took as tenants in common, though it would have been otherwise if the gift had been to them as joint tenants. He held also that under the circumstances the testatrix did not impose any trust upon D., and that the gift to him was good also.

We ought to add here a notice of the case of *Boyes* v. *Carritt* (26 Ch. D. 53) (March, 1884, Kay, J.). There a testator made a will leaving all his property to his solicitor, and the solicitor undertook to apply it upon such trusts as the testator should communicate to him by letter. The testator made no communication to the solicitor during his lifetime, but he left two

letters, signed but not attested, saying that he wished the solicitor to keep £25 and make over the rest of the property to A. He told A. of these letters and the effect of them; and they were found among his papers after his death. The solicitor wished to act upon the letters.

It was held that the solicitor became a trustee upon an indefinite trust, and that as the letters were neither communicated to him nor attested as codicils, they did not give definiteness to the undefined trust; and the solicitor was a trustee for the next of kin. A contrary decision would have enabled an unattested document to take effect as a codicil.

We ought also to mention here the case of *O'Brien* v. *Tyssen* (28 Ch. D. 372) (Dec. 1884, V.-C. Bacon), which will be found stated in the chapter on Church Building. There was a secret trust alleged in that case for a purpose excepted out of the Georgian Mortmain Act, and the trust was held to be good, so that no claim could be made by the heir-at-law. The case presents a difficulty, inasmuch as the Church Building Act, 43 Geo. 3, c. 108, enables such a devise to be made by a will executed three months before the testator's death, and the trust appeared to be under discussion during that interval. In general, however, if a trust is imposed on a devisee which might have been incorporated in the will, the trust is good and will be enforced.

Voluntary Covenants.

Just as the Court will not let the Georgian Mortmain Act be evaded by a secret trust, so it will not allow it to be evaded by a voluntary covenant to pay money to trustees for a charitable purpose. Such a covenant has been treated as equivalent to a legacy (*Jefferies* v. *Alexander* (8 H. L. C. 594); *Fox* v. *Lownds* (L. R. 19 Eq. 453)). However, in *Emley* v. *Davidson* (19 Ch. D. 156) a man covenanted to pay £20,000 to trustees for his wife and himself for life, and then as she should appoint, and she appointed to charity, and the £20,000 was held payable out of his impure personalty.

Jefferies v. *Alexander* (8 H. L. C. 594) (July, 1860; reversing

the decisions of the Lords Justices and the M.R. in *Alexander* v. *Brame* (19 Beav. 436 (July, 1854), and 7 De G. M. & G. 525) (July, 1855)). A testatrix executed a deed whereby he covenanted with certain trustees that he would invest £60,000 in consols, in their names within twelve months; and that, if he did not do so, his executors should do so after his death, but subject to the prior payments of his debts and legacies, and the deed declared trusts of the £60,000 for the benefit of the poor of Ipswich. He retained the deed in his own possession until his death, and only mentioned it to others upon his death-bed.

It was held that the £60,000 could not be paid out of realty or impure personalty.

Fox v. *Lownds* (L. R. 19 Eq. 453) (February, 1875, Jessel, M.R.). Testatrix by deed covenanted with trustees that she would pay £100 a year during her life towards the stipend of a chaplain at a certain infirmary, and would by deed or will provide to be paid after her death a sum sufficient to produce £130 per annum in perpetuity for the same purpose.

By will she gave to the trustees of the deed such a sum as, if invested in Government securities, would produce a clear £130 per annum.

She left sufficient pure personalty to pay this sum, and she also left some impure personalty.

It was held that the gift must be treated as failing to the extent of the proportion of the impure to the pure personalty. This is in accordance with the principle of treating it as payable out of both rateably, as discussed in the chapter on Administration.

Emley v. *Davidson* (19 Ch. D. 156) (November, 1881, C. A. reversing V.-C. Bacon). R. executed a deed on August 8, 1868, whereby he covenanted with trustees to pay them £20,000 to be held on trust either to retain the same as then invested or with the consent of R. and his wife or the survivor to make new investments in Government securities or railway debentures and pay the income to the wife for life, then to R. for life, and then as the wife should by will or codicil appoint. The wife by

will dated the same day appointed certain legacies, some being charitable, to be paid out of the £20,000 and the residue to be paid to such persons as she should by deed-poll appoint. She executed a deed-poll also dated the same day, directing the residue to be applied for a charitable purpose. The wife died in 1870 and R. in 1877. The £20,000 had never been paid. It was admitted that the deed-poll must be proved as testamentary.

The Court of Appeal, reversing V.-C. Bacon, held that the transaction was valid, and that the wife at her death was simply entitled to a reversionary interest in the trust fund, which was then a personal debt due from her husband as a covenant under seal, and that such property was pure personalty, which she could bequeath in charity. The whole was therefore payable out of the assets of her husband, whatever the nature of those assets was.

CHAPTER XXX.

On Crown Rights by Sign Manual.

We have seen that Parliament thought fit to vest in the Crown all land devoted to superstitious purposes prior to the reign of Edward VI. We have also called attention to an Act of 1 Eliz. vesting in the Crown all property devoted to such purposes during the reign of Queen Mary, and a still later Act of similar import. But we have seen that these Acts were not prospective, and that superstitious trusts created subsequently to them have been held void for the benefit of the residuary beneficiary. On the other hand, property devoted to forbidden religious trusts has been held to fall under the power of the Crown to appoint to other charitable purposes by sign manual as it is called. The Courts held that such trusts shewed an intention of charity, but mistaken charity, and they seemed to think that the Crown as *parens patriæ* ought to have the right to remedy the testator's mistake. In the same way some judges seem to have thought that if a testator gave property in charity, without specifically defining his objects, the Crown had the right to fill in his outline and define the objects who should enjoy it.

Superstitious trusts.

Forbidden religious trusts.

Undefined charitable trusts.

This is first found in certain proceedings narrated in the reports of *A.-G.* v. *Matthews* (2 Lev. 167) (T. T. 1676) and *A.-G.* v. *Peacock* (Finch, 245) (H. T. 1676–7). It seems that H. Fryer by will appointed that certain land should be held on trust to pay £100 per annum to three parishes for their poor, and, after appointing some other charitable trusts which determined, directed the trustees to stand seised of the residue to the use of the poor in general for ever. His heir contested this will in the Court of Wards in 8 Car. 1, 1632–3, and it was referred to the king, Charles I., who, by the advice of Lord Keeper Coventry

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(who died Jan. 1640), awarded that the £100 per annum should be paid to the parishes in certain shares, £80 per annum to the rebuilding and repairing of St. Paul's, and the rest to the heir. The case in the Court of Wards seems to have borne the name of *Frier* v. *Peacock*. At a later date a commission was issued out under the Statute of Elizabeth, and the commissioners settled the whole land to charitable uses without regard to the king's award. This decree of the commissioners was quashed by Lord Keeper Finch, who entered into office in Nov. 1673, the ground of decision being that a trust for the poor in general was to be determined by the king in the Court of Chancery on information by the Attorney-General, and was not within the jurisdiction of the commissioners. An information was then brought, and on the hearing in T. T. 1675 the Lord Keeper held that the charity belonged to the king to dispose, but only to the poor, and that the appointment to St. Paul's was bad, and directed the case to stand over for the king to appoint (*A.-G.* v. *Matthews* (2 Lev. 167)). The king thereupon appointed the surplus to the benefit of the children of the new Royal Foundation in Christ's Hospital, being forty poor boys therein, educated in a mathematical school, and to learn the art of navigation. This appointment was confirmed in *A.-G.* v. *Peacock* (Finch, 245).

Note.—The report in Finch mentions King Charles II. instead of Charles I., and is dated H. T. 28 Car. 2, 1675–6, but H. T. 28 Car. 2 was in Jan. 1676–7, and the hearing reported in Finch is clearly later than that in Levinz, and is referred to in the last lines of the last-mentioned report.

This case was soon followed by two others, in which the same decision was given under slightly different circumstances. The cases were as follows :—

Clifford v. *Francis* (Freem. 330) (M. T. 1679, Exch.). A man devises the surplus of his estate, after debts paid, to his executors, to be disposed of by them in pious uses ; the question was whether the commissioners for charitable uses had power of this ? And the Court took this difference :

That when money is given to a charity, without expressing

what charity, then the king is the disposer of the charity, and a bill ought to be prepared in the Attorney-General's name for that purpose.

But if the charity be expressed, then it is in the power of the commissioners for charitable uses.

A.-G. v. *Syderfin* (1 Vern. 224 ; 7 Ves. 43, n., 70, 71) (Feb. 1683). Testator by his will charged certain real estate with the raising of £1000 out of the profits to be applied to such charitable uses as he had by writing under his hand formerly directed. No such writing was found. The king directed the money to be applied for the mathematical boys at Christ's Hospital:

Held, that the king had the right so to appoint it.

We ought next to mention an *Anonymous Case* in M. T. 1702 (Ch.), reported in 2 Freem. 261, and quoted in full in 7 Ves. 73, 74: "It was said, and not denied, that if a man deviseth a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note or codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the Court should think fit.

"And so it was held in the case of Mr. Syderfin's will and the case of one Jones ; but if the will points at any particular charity, as for maintenance of a schoolmaster or poor widows, then the Court of Chancery ought not to direct it to any other purpose but such as is pointed out by the will. As if a devise should be for such school as he should appoint, and appoints none, the Court may apply it for what school they please ; but for no other purpose than a school, although it may be for what school the Court thinks fit."

It will be seen that the first proposition here laid down is based on a wrong recollection of the case of *A.-G.* v. *Syderfin*, as the decision there was that the Crown and not the Court should appoint, and reference was to a past and not a future writing. This dictum therefore cannot be relied on, in as far as it substitutes the Court for the Crown in the first sentence ; but the latter part of the dictum appears to be correct.

On the other hand the right of the Crown was extended in *A.-G.* v. *Berryman* (1 Dick. 168) (June, 1755), by Lord Hardwicke, to a case in which £500 was left by will to be disposed of in charity at the discretion of B. B. died without exercising his discretion, but by will purported to confer the discretion on his brother. It was held that the distribution of the money rested with the Crown. We shall see, however, that this case is overruled by *Moggridge* v. *Thackwell*.

The next case appears to be good law so far as this point is concerned.

A.-G. v. *Herrick* (2 Amb. 712) (L. C. 1772). Testator, by will dated August 10, 1732, devised realty and personalty to H. on certain trusts, directing the ultimate residue to be paid and applied to charitable and pious uses.

This was held to be a good charitable gift, to be applied as the Crown might direct.

Law settled in 1803.

The law on this subject was finally laid down in *Moggridge* v. *Thackwell*, which first came before Lord Thurlow in 1792 (3 Bro. C. C. 517) (1 Ves. Jun. 464), and was affirmed on a rehearing by Lord Eldon in May, 1803 (7 Ves. 36). There the residue was given to V. "to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters." V. died before the testatrix.

Lord Eldon, after reviewing all the cases, held that the Court, and not the Crown, had the right to apply the fund. He thought the right belonged to the Crown only where money was given to charity generally and indefinitely without trustees or objects selected; but if a testator indicated his objects, or named some trustee or trustees to select them, and such trustee or trustees died without exercising the power, the administration of the fund belonged to the Court.

In *Moggridge* v. *Thackwell* the testatrix had made an indication of some objects, and the judgment may appear a little doubtful as to how far that circumstance affects the result. This doubt is, however, set at rest by the case of *Paice* v. *Arch-*

bishop of Canterbury (1807) (14 Ves. 364). The gift there was to the Archbishop of Canterbury and to the Archbishop of York for the time being in trust for charitable purposes. The archbishops declined to act, and Lord Eldon ordered a scheme to be settled, saying that where the bequest is to trustees for charitable purposes the disposition must be in that mode; but where the object is charity, without a trust (trustee ?) interposed, it must be by sign manual. A succeeding archbishop was willing to act, but that circumstance appears to have been treated as immaterial.

In *Newland* v. *A.-G.* (3 Mer. 684) (July, 1809) there was a bequest of stock "to His Majesty's Government in exoneration of the national debt," and Lord Eldon directed it to be transferred to such person as the king under his sign manual should appoint. But not always observed since.

It is curious to find this decision after the principle laid down in *Moggridge* v. *Thackwell*. It may be surmised that a different course would be adopted now, and any stock so bequeathed would be invested by the Court in the Government Funds, if not already so invested, and the same transferred to the Commissioners for Reduction of the National Debt to be cancelled.

In *Mills* v. *Farmer* (1 Mer. 55) (Lord Eldon, 1815) the bequest was of a residue to two specified charitable purposes, "and other charitable purposes as I do intend to name hereafter." No trustees were appointed of this bequest, and the testator did not name any other purposes thereafter. A scheme was directed. Apparently the indication of two special purposes was sufficient to entitle the Court to settle the application of the fund.

The law as laid down by *Moggridge* v. *Thackwell* has been treated as settled in *Ommanney* v. *Butcher* (1823) (1 T. & R. 270), *Hayter* v. *Trego* (1828) (5 Russ. 113), and in other cases.

On this subject there is also a case of *A.-G.* v. *Marchioness of Londonderry*, stated in Shelford on Mortmain (pp. 272, 273), with a reference to Reg. Lib. A. (1825, fol. 1553). In that case land had been vested by two donors in trustees in 1685, with a direction that the rents and profits should be applied for certain

charitable purposes, and to such other workhouses, schools, or such other godly and charitable uses as the donors, or the survivor of them, should appoint. The donors died without making any appointment, and it was held that the Crown had the right to appoint. It is rather difficult to reconcile this case with the principle laid down in *Moggridge* v. *Thackwell* and with the decision in *Mills* v. *Farmer*, for it is clear that some objects were indicated to act as guides to the Court.

There is also the case of *A.-G.* v. *Fletcher* (5 L. J. N. S. Ch. 75) (Nov. 1835, Lord Langdale, M.R.), stated in the chapter on Incomplete Gifts, where the gift was "to charitable purposes which should be thereafter specified, or in default according to the best judgment of M., the sole executor," and M. renounced probate, and it was held to go to charitable purposes as the king by sign manual might direct. But this decision appears to have been given rather hastily, and it is not in accordance with *Moggridge* v. *Thackwell* (*ante*, p. 210).

There is also an Irish case of *Felan* v. *Russell* (4 Ir. Eq. 701) (June, 1842), where the decision is contrary to the rule laid down by *Moggridge* v. *Thackwell*. A bequest was there made to a trustee to "be by him applied for such pious purposes and uses as should appear to him," &c. The trustee consented to a scheme being settled by the Court, but died before that was done; and it was held that the disposition of the fund belonged to the Crown.

CHAPTER XXXI.

On Remoteness as affecting Charitable Gifts.

We have already noticed many cases of bequests for the establishment of new charitable institutions, where the testator's object could not be carried out by his own trustees alone, but some act was required to be done by some other person, such as a gift of land as a site for the institution. In such cases, if no limit is fixed to the time within which all necessary conditions precedent must be fulfilled, an objection may be raised that the gift is not limited so as necessarily to take effect within the period defined by the rule of remoteness. On considering the cases, however, we find that the Court has not subjected such cases to this rule, but has adopted a very elastic principle, namely, that all conditions must be fulfilled within a reasonable time.

Reasonable time allowed.

The cases on this point are not numerous, and we can proceed at once to state them in chronological order.

In *A.-G.* v. *Bishop of Chester* (1785) (1 Bro. C. C. 444) a testator gave £1000 bank annuities to the defendant and S. for the purpose of establishing a bishop in His Majesty's dominions in America. It was held that the fund should remain in Court till it should be seen whether any such bishop should be appointed.

Fund held in suspense.

In *Henshaw* v. *Atkinson* (1818) (3 Madd. 306) a testator gave large sums to establish a Bluecoat school and a blind asylum, adding, "but I direct that the said monies shall not be applied in the purchase of land or the erection of buildings, it being my expectation that other persons will at their expense purchase land and buildings for those purposes." Eight years

Lapse of eight years.

elapsed after the testator's death, and no land had been given when the case came before the Court. Nevertheless, the gift was held good; but the settlement of the manner of administering the charities was postponed until the accounts of the estate were completed.

In *A.-G.* v. *Master, &c. of Catharine Hall, Cambridge* (1820) (Jac. 381), a testatrix gave all her estates to trustees on trust, when certain matters were performed, and a site of ground purchased or procured for erecting a building for the reception of six fellows and ten scholars in St. Catharine's Hall, then to convey all her real estate to the master and fellows thereof on certain trusts. The testatrix died in 1745. A decree for administration of her estate was made in 1752; and in 1769 the estates were conveyed to the college under the direction of the Court.

Lapse of twenty-four years.

In the case of *Mayor of Lyons* v. *East India Company* (1836) (1 Moore P. C. 175) the effect was considered of a bequest of property in Bengal to establish a charitable institution at Lucknow in the semi-independent kingdom of Oude. The Privy Council directed the fund to be retained pending inquiries as to the feasibility of effecting the testator's object. Lord Brougham relied on *A.-G.* v. *Bishop of Chester* (1 Bro. C. C. 444) as a precedent for this course, and added—"No doubt, in that case, if some years had elapsed, and no prospect appeared of an episcopal establishment in Canada, the Court would then have declared the legacy void, and distributed the fund to the parties entitled. So here, if it shall be found, either at first that there can be no application of the fund in the manner directed by the will, or that the trustees, after making the attempt, fail in it, the Court will then direct the same application to be made of it, which they would have done had the bequest been at first declared void."

Some comments approving of the above-mentioned cases of *Henshaw* v. *Atkinson* and *A.-G.* v. *Bishop of Chester* may be found in the judgment of Lord Cranworth in *Philpott* v. *The President, &c. of St. George's Hospital* (1857) (6 H. L. C. 338, see pp. 358–

360), but the precise point which we are now considering did not arise in that case. Nor did it arise in the case of Downing College, there referred to, which will be noticed in our chapter on *Cy-près* or Original Failure.

Our point, however, arose in *Girdlestone* v. *Creed* (10 Hare, 480) (February, 1853) (see the chapter on Exceptions to the Georgian Mortmain Act), where a bequest was made for building and endowing a church at a place where none existed, and £500, being the amount authorized by the Act 43 Geo. 3, c. 108, was set apart and an inquiry was directed whether there were any means of applying it to the object named (*ante*, p. 374).

Our point also arose in *Sinnett* v. *Herbert* (1872) (L. R. 7 Ch. 232), where Lord Hatherley reversed V.-C. Bacon (L. R. 12 Eq. 201). There a testatrix left her residue to her executors "upon trust to be by them applied in aid of erecting or of endowing an additional church at A." The Lord Chancellor held that the testatrix intended a church in addition to all which existed at her death, and that the pure personalty might be bequeathed for the alternative of endowing such a church, and £500 of impure personalty towards erecting or endowing it, under the Act 43 Geo. 3, c. 108. He cited with approval *A.-G.* v. *Bishop of Chester*, with an intimation that the Court would not retain a fund for an indefinite time in such a case, and then directed an inquiry whether the funds given for the purpose of aiding in erecting or endowing a church at A. could be so laid out and employed.

The next case calling for notice is *Chamberlayne* v. *Brockett* (L. R. 8 Ch. 206) (December, 1872), which appears at first sight to break in upon the uniformity of the course of decisions on this subject. In that case there were gifts for the erection of almshouses at certain places, "when and so soon as land shall at any time be given for the purpose." The Master of the Rolls held all the gifts to be void for remoteness, inasmuch they were dependent on an event, which might not arise for an indefinite time. The Court of Appeal gave a different decision from the Master of the Rolls on the ground that there were other expres-

sions in the will, which devoted the whole property to charity immediately on the death of the testatrix; and, that being so, it was immaterial that there was an indefinite suspense or abeyance of its application, or its capability of being applied to the particular use for which it was destined; as in default thereof, it would be applicable *cy-près*. But Lord Selborne, in giving judgment, said, "If the trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." And the Lord Chancellor added more to the same effect, but his judgment may well stand with the earlier cases, which appear to establish that an immediate gift to a charity which requires the provision of land, or the performance of some other condition before it can take effect, is read as being dependent on the performance of such condition within a reasonable time.

Trust for charity may be too remote.

The case of *Re White's Trusts* before V.-C. Bacon, July, 1882 (30 W. R. 837), and July, 1886 (33 Ch. D. 449), gives a completeness to this part of our subject which would otherwise be wanting. The following is a statement of it:—

A testator bequeathed £1000 on trust for A. for life and after her death to the officers of the Tinplate Workers' Company, upon trust as soon as conveniently might be after his decease, and when a proper site could be obtained for that purpose, to build almshouses for the use of blind, helpless, or decayed liverymen, freemen, or (failing them) other men of the trade. The charity was to be managed by the officers of the company, and the testator expressed a hope that somebody would give an endowment. The gift was first held good if a site were provided by others (30 W. R. 837); but it proved impossible to obtain either site or endowment, though the company tried for four years to obtain them; and the company being too poor to provide

Fund paid over after lapse of reasonable time.

them, petitioned the Court that a scheme might be settled for carrying out the intentions of the testator by giving pensions or otherwise. Bacon, V.-C., said that the legacy had been given for a particular object only; and that, as that had failed, the legacy lapsed and fell into the residue.

In contrast with *Re White's Trusts*, we must mention the case of *Biscoe* v. *Jackson*, where money was bequeathed for the establishment of a soup kitchen and cottage hospital at S., in such manner as not to violate the Mortmain Acts, with further bequests for the endowment of the institutions. This bequest was held valid (W. N. 1881, 101; W. N. 1882, 16), and an inquiry was directed, in answer to which the chief clerk certified that the fund could not be applied in accordance with the directions of the will. The next of kin then applied for the money, but the Court held that the will shewed a general charitable intention in favour of the poor of S., and ordered a scheme to be settled for applying the fund *cy-près* (*ante*, p. 318).

Or applied *cy-près*.

With respect to the time within which future gifts for charitable purposes must vest, the law may be taken to be settled by the judgment in *Chamberlayne* v. *Brockett* (L. R. 8 Ch. 206), which has been mentioned above.

In the case of *Company of Pewterers* v. *Christ's Hospital* (1683) (1 Vern. 161) it was held that a limitation over to a charity to take effect when a tenant in tail should go about to aliene, was void. The Lord Keeper negatived the idea that the law would give effect to such a limitation in favour of a charity, when it would not do so in favour of an individual. We may observe, however, that a gift over to an individual on a prior taker going about to do a thing, is void for indefiniteness or uncertainty (*Mildmay's Case* (6 Co. Rep. 40)). The case therefore only shews that a future gift to a charity to arise on the fulfilment of an indefinite or uncertain condition, is void.

Gift to charity on uncertain condition, void.

The other point noticed in the judgment in *Chamberlayne* v. *Brockett* is also clearly established, namely, that if property

is absolutely devoted to charity, it is freed from the rules of remoteness, and may be given over from one charity to another on the happening of any event, at any time however remote. Thus :—

Gift over from one charity to another, good however remote.

In *The Society for the Propagation of the Gospel in Foreign Parts* v. *A.-G.* (3 Russ. 142) (December, 1826, M.R.) a testator in 1715 willed that his executors should within one month, or two at the furthest after the appointment and consecration by lawful authority of two Protestant bishops, one for the continent, another for the islands of North America, pay to the plaintiff society £1000 to be applied in equal portions to the settlement of such bishops in their sees. In the meantime he directed the £1000 to be invested and the income to be applied by his executors for the benefit of invalided missionaries of the society. A decree in 1717 directed the £1000 to be invested and the income to be applied as directed by the testator, until such bishops should be consecrated. As a matter of fact, the income, or a great part thereof, was accumulated, and the fund increased to £9410 consols, £750 reduced annuities, and a large sum of cash. In 1824 two bishops were appointed for islands of North America, and there had long been two on the continent. The society then brought this suit against the Attorney-General, and the whole fund was ordered to be paid to them.

Again, in *Christ's Hospital* v. *Grainger* (1849) (1 M. & G. 460; dismissing an appeal of the Attorney-General from the decree in 16 Sim. 83) property had been vested in the corporation of Reading upon certain charitable trusts, with a proviso that if the corporation should fail to perform the trusts for a whole year at any time the property should be paid and transferred to the corporation of London for the benefit of Christ's Hospital. The corporation of Reading made default for more than forty years. It was held that the gift over was valid and could be enforced even when twenty years had elapsed since the right to enforce it first accrued. The mode in which the Statute of Limitations is disposed of is far from satisfactory; on appeal the Lord Chan-

cellor suggested that the defendants became trustees for the plaintiffs, but he held that the Attorney-General, who was the only appellant, could not avail himself of the statute.

This case shews also that beneficiaries may suffer through the default of their trustee, when the settlor expressly so directs.

Here we may add :—

Re Conington's Will (8 W. R. 444) (May, 1860, V.-C. Wood). A testator in 1718 devised lands to the use of the vicar of L. for ever, upon condition that he should read or cause to be read service in the church of L. on every Wednesday, Friday, and holy day, at 11 A.M., with a gift over on any neglect during the rest of the life of the negligent vicar for the benefit of a certain school in W. The vicar in 1860 had always been willing to read service on the days named, but no one ever attended.

It was held that he had not been negligent, but an inquiry was directed whether the intention of the testator could be effected in any other way.

Or clause restoring property to donor.

It has even been held that a clause avoiding a charitable gift on a future event and bringing the property back to the representatives of the testator, is good, although not so framed as only to operate within the limits fixed by the rules against remoteness. This appears to be established by the following cases :—

A.-G. v. *Pyle* (1 Atk. 435) (Feb. 1738, Lord Hardwicke). The report states: "A. devises a freehold messuage at R. to the charity school there, and directs the rents and profits shall be applied for the benefit of the said school, so long as it shall continue to be endowed with charity," and gives as the judgment :—" Lord Chancellor : Where a sum of money is given to a charity, so long as it shall continue to be endowed with charity, it is only given *quousque*, and when it ceases, if it is a gift of real estate, it shall fall into the inheritance for the benefit of the heir ; if personal, into the residuum."

The will in this case was evidently made before the Georgian Mortmain Act. The Lord Chancellor further made an order declaring that the rents and profits of the messuage at R. ought

to be applied to the benefit of the charity school at R., so long as the said charity school should continue to be endowed with charity, and directing the heir-at-law to convey the messuage to the trustees of the school.

Walsh v. *Secretary of State for India* (10 H. L. C. 367) (May, 1863).

In 1770 a deed was executed between the directors and others forming the East India Company, of the one part, and Lord Clive, of the other part, which recited that Lord Clive had made over five lacs of rupees and another person had made over three lacs to the company. It was agreed that the amount of the interest thereon should be applied in paying pensions to disabled officers of the company, and annuities to widows of officers of the company, and the directors covenanted, amongst other things, that if after January 1, 1784, they should "cease to employ a military force in their actual pay and service in the East Indies, and also ships for carrying on their trade and commerce, then and in such case, as soon as the said event shall happen, they shall pay unto Lord Clive, his executors, &c., for his and their own use, at the Treasury at Calcutta, the full sum of five lacs of sicca rupees, but subject with the interest of the three lacs of rupees, in the proportion the said sums bear to each other, to the payment of all such pensions and annuities, for the lives of the persons then entitled thereto only, as shall, at the time such event shall happen, be payable out of or chargeable upon the said trust fund."

In 1834 the company ceased to employ ships, in obedience to an Act of the previous year ; and in 1858 they ceased to employ a military force, in obedience to another Act. The personal representative of Lord Clive thereupon filed a bill claiming the five lacs, subject to the payment of five-eighths of the existing pensions.

The Master of the Rolls dismissed the bill, holding that the Crown stood in the shoes of the company for all purposes, but the House of Lords reversed this and made an order as prayed.

But the point that the covenant was void for remoteness was not taken, and the judges held that it was not a case of trust, but an action on a covenant.

Randell v. *Dixon* (38 Ch. D. 213) (Feb. 1888, North, J.). Testatrix bequeathed £14,000 to trustees upon trust in effect to pay the income to the incumbent for the time being of the district church at H. so long as he should permit all the sittings in the church to be occupied free of rent, but in case any such incumbent should make any claim for and receive any payment in respect of the occupation of any pews or sittings in the said church, the said trust fund should fall into and be dealt with as part of her residuary personal estate:

Held, on the authority of *Walsh* v. *Secretary of State for India*, that the direction in the will that in the events therein mentioned, the fund representing the £14,000 should fall into and be dealt with as part of the residuary personal estate, was not void on the ground of perpetuity.

This condition sometimes imposed by law.

Parliament has, in some cases, given special powers for conveying lands for certain charitable purposes, and imposed on such grants the condition, that if the land ceases to be used for the purposes named, it shall revert to the former uses.

The statute 4 & 5 Vict. c. 38 gives such a power for school purposes.

The statute 17 & 18 Vict. c. 112 gives such a power for literary and scientific institutions.

The statute 36 & 37 Vict. c. 50, amended by 45 & 46 Vict. c. 21, s. 2, gives such a power for places of worship, minister's houses, and burial places.

CHAPTER XXXII.

On the Question of Directing a Scheme or not doing so.

We proceed to consider in what cases the Court will direct a scheme to be settled, and in what cases it will order money to be paid over without any such direction.

Different kinds of trustees.

On reflection it will be seen that the execution of charitable bequests may be committed to three different classes of trustees, namely,

(1.) An existing corporation.

(2.) The officers of an existing unincorporated society.

(3.) Individual trustees.

And again, an existing unincorporated society may be a society of long standing with an effectual system of calling its officers to account; or it may be a short-lived institution, where a misappropriation on the part of the officials might easily pass unnoticed.

In the case of individual trustees also, those named by the testator may survive him and undertake the trust, or they may die before him, or refuse to act in the matter.

Turning again to the nature of the trusts reposed, they may be divided as follows:—

Different kinds of trusts.

(1.) Trusts for the general purposes of a corporation or unincorporated society, so that the money given falls into the general funds thereof, and is applicable accordingly.

(2.) Other trusts authorizing an immediate distribution of the fund.

(3.) Other trusts of a temporary nature.

(4.) Other trusts requiring the establishment of a permanent charity.

And in each of the three last-mentioned cases there may be an expression by the testator that he entrusts the administration of his bounty to the trustees appointed by him. Moreover, in each of the same cases the trust may be of a very general nature, or it may be more or less defined by the testator.

Multiplying all the different cases of trusts by all the different cases of trustees, we get a rather formidable total; and it may at once be said that all these different cases have not been considered and decided on by the Court. Indeed, in many cases the question of scheme or no scheme has not been argued before the Court; but the judge has suggested a scheme and the trustees have agreed to it; or he has proposed paying money over, and no scheme has been asked for; so that in unargued cases the practice has not always been uniform.

The point has, however, been argued out in some cases, and the decisions there given, and the principles to be deduced from them, offer a guide by which a tolerable certain answer may be given in any case as to whether a scheme should be directed or not.

Corporation trustee.

First of all, if an existing corporation is made the trustee, the rule is that the fund will be paid over to it without directing any scheme, unless the gift is directed to form a permanent trust of which the income has a special application so as not to fall into the general funds of the corporation. The case of *The Society for the Propagation of the Gospel in Foreign Parts* v. *A.-G.* (3 Russ. 142) (Dec. 1826) is a leading authority on this point. The case will be found stated *ante*, p. 297, and more fully p. 428. It will be seen that the fund in that case was affected with a special trust, but it was capable of being applied at once. On the other hand, in *The Corporation of the Sons of the Clergy* v. *Mose* (6 Sim. 610) (March, 1839) a fund was given to a corporation on a special permanent charitable trust, and it was held necessary to bring the Attorney-General before the Court that he might superintend a scheme, as in *Wellbeloved* v. *Jones*, which is stated below.

But if a corporation has misapplied charitable funds with which it has been entrusted, and the Attorney-General files an information against it to enforce a proper application of the funds, then a scheme may be directed, or the decree of the Court may embody the directions for the future administration of the trust (*A.-G.* v. *Coopers' Co.* (19 Ves. 186) (July, 1812)).

And when a surplus arises, which is not committed to the discretion of the corporation, a scheme will in general be directed.

Officers of unincorporated society trustees.

Secondly, if the trustees are the officials of an unincorporated society, several distinctions are drawn.

If the trust is for the establishment of a special permanent charity, a scheme will be ordered.

The leading case on this point is that of *Wellbeloved* v. *Jones* (1 Si. & Stu. 40) (Nov. 1822, V.-C. Leach).

A testator gave £5000 to his executors on trust to transfer the same to the Theological Tutor, the Visitor, the President, the Treasurer, and the Vice-President resident in Manchester of Manchester New College, being an institution for training Non-conformist ministers, then removed to York, the same to be held in trust to pay the income in augmentation of the salaries of such conscientious dissenting ministers as should stand most in need of such assistance, and as the trustees should approve, with further trusts of like nature in case the institution should cease. And the testator empowered the first trustees to make rules and regulations for distributing the income and preserving the capital.

Special trust.

The first trustees asked for payment of the fund to them:

Held, that the Attorney-General must be made a party to the suit. The Vice-Chancellor added: "It has been held not to be necessary that the Attorney-General should be a party where a legacy is given to the treasurer of some established charitable institution, to become a part of the general funds of that institution. And this exception is reasonable, for the Attorney-General can have no interference with the distribution of their general funds.

"The Court will never permit this legacy to come into the hands of the plaintiffs who now happen to fill the particular offices in this society, but will take care to secure the objects of this testator by the creation of a proper and permanent trust, and will send it to the Master for that purpose; and it will be one of the duties of the Attorney-General to attend the Master upon that subject."

We may here observe at once that when the Court directs a scheme in such cases, the trustees named by the testator have the right to draw up a scheme and submit it for approval, and the Attorney-General is then allowed to suggest any alterations in it.

Purposes of society.

As an instance of a fund being paid over to the officers of an unincorporated association, when given for the general purposes of the association, we may cite *Carter* v. *Green* (3 K. & J. 591) (July, 1857), where a bequest was made to the treasurer of the Village Itinerancy, "to be appropriated for the pious and benevolent purposes of that association." Evidence was given of the constitution of the Village Itinerancy, and the legacy was ordered to be paid to its trustees, with a declaration that it was not to be laid out in land (see the chapter on Mortizing, p. 329).

In *Shrewsbury* v. *Hornby* (1846) (5 Hare, 406) there was a gift of a terminable annuity to the trustees of an unincorporated association on trusts much resembling those in *Wellbeloved* v. *Jones*, but the question of ordering a scheme does not seem to have been raised.

A curious point on this subject arose in *Walsh* v. *Gladstone* (1 Phill. 290) (Dec. 1843). There a testator gave "a sum of £4000 to the Rev. T. R. to be applied to the use of Ampleforth College, in Yorkshire." The Rev. T. R. was not an officer of the college, and he also died before the testator.

The legacy was claimed on petition by the president of the college, who gave evidence that it had existed since the beginning of the present century for educating Roman Catholics; that it was governed by a president, who had control of its revenues and property, and was alone entitled to receive its

money, and conduct its expenditure. The question was carried to the Lord Chancellor, who said: "Whether a scheme should be directed or not will depend upon the information I may have as to the nature of the institution and the situation of the officer. If there are already existing funds belonging to the institution, and if the president, who has the management of those funds, is appointed for life, so as to give him a permanent character, the legacy may perhaps be paid to him without referring it to the Master to settle a scheme. But suppose the president held his office by a precarious tenure—by an appointment from year to year, for instance—and that the institution was supported by voluntary contributions, then it might be right that a scheme should be settled. If there is a character of permanence in the institution, and in the situation of the officer, the Court will hand it over to him without a scheme, as was done lately in the case of the Venice Charity (*Cockburn* v. *Raphael* (L. C., May 9, 1842)). Where a testator, who is a Roman Catholic, leaves money for the use of a Roman Catholic establishment, all I have to do is to see that it is applied to the use of that establishment, and that it is paid into hands in which it will be safe. I have nothing to do with the internal management, discipline, and mode of education in such an institution."

Evidence of nature of society.

The petition accordingly stood over, and further evidence was given that the college had been established in 1802, as a continuation of an older institution in France which was broken up at the Revolution; that its object was to educate laymen as well as ecclesiastics; that it was governed by persons educated there and afterwards ordained; that the president was elected every four years by the governors, and was treasurer, and managed its pecuniary concerns, for which he was accountable to an auditor. Several Roman Catholic peers also deposed that they had been educated at the college, and that it was a permanent institution, and they testified to the respectability of the president.

On this further evidence the Lord Chancellor ordered the money to be paid to the president.

It will be observed that in this case the trustee named by the testator had died, and the decision, therefore, does not apply to the case of a bequest by a testator direct to the officers of a society for the use of a society. But there may well be other cases in which evidence should be tendered of the nature required by the Lord Chancellor in this case.

We may next mention the case of *Lea* v. *Cooke* (34 Ch. D. 528) (Feb. 1887, North, J.).

A testator bequeathed thus:—"To General William Booth the sum of £4000 for the spread of the Gospel." He gave other legacies in the same words. The Court considered that he did not intend the establishment of a permanent trust. There was evidence that the legatee bore the title "General" as being the chief officer of an association called the Salvation Army; and that in that capacity he was entrusted with large sums of money, which he spent at his discretion for the purposes of the association, and of which he published annual accounts. One of the purposes of the association was, in fact, the spread of the Gospel:

Held, that the legacy should be paid over to the legatee without directing any scheme, merely giving general leave to apply.

It will be seen that this case holds an intermediate position between legacies to the officers of an association and legacies to individual trustees. The legatee was, in fact, the officer of an association established for the purpose named; but his position was an autocratic one, resembling that of a legatee uncontrolled by any association.

Private individuals trustees.

Thirdly, taking the case of individual trustees, we find the following practice established:—

(*a.*) That if the testator directs the establishment of a permanent charity, a scheme will be directed, even though he expressly confides the details to the discretion of his trustees.

(*b.*) That if the testator's bequests authorize an immediate distribution, or a distribution at intervals for a limited period, and the trustees are alive and accept the trust, no scheme will be ordered. This result is arrived at, whether the testator

expressly confides the details to the discretion of his trustees or a discretion is merely implied from the nature of the case.

(*c.*) That if the trustees die or refuse to act, a scheme will be directed.

An instance of a scheme being directed for a permanent charity, though confided to the discretion of the trustees, will be found in *A.-G.* v. *Stepney* (10 Ves. 22), which is stated in the chapter on Dependent Gifts (*ante*, p. 332).

An instance of a fund being paid over without a scheme, when the trust authorized an immediate division, will be found in *In re Barnett* (29 L. J. N. S. Ch. 871), stated in the chapter on Cases of Religious Trusts (*ante*, p. 130).

Instances of funds being paid over, when the trusts were only temporary, will be found in *Waldo* v. *Caley* (16 Ves. 206) (May, 1809) (*ante*, p. 190), *Powerscourt* v. *Powerscourt* (11 Moll. 616) (Nov. 1824, Ireland) (*ante*, p. 199), and in *Horde* v. *Earl of Suffolk* (1833) (2 M. & K. 59) (*ante*, p. 192). As the question was argued out in the last-mentioned case it will be proper to state it more fully.

In this case a testatrix directed her executor to pay to H. "the sum of £180 annually, during the term of her natural life, to be by her distributed in charity according to her own discretion and judgment either to private individuals or public institutions in such sum or sums, way, and manner as she shall from time to time choose, without limitation or control from any person whomsoever." There were other gifts of annuities in like manner, and an ultimate gift of the residue of the estate to certain persons upon the same trusts.

Leach, M.R., said :—"This case appears to me not distinguishable from *Waldo* v. *Caley*. In that case Sir William Grant, considering that the widow had an absolute discretion as to the disposition of the fund, made a declaration accordingly; and thinking a scheme unnecessary, he directed that any of the parties should be at liberty to apply as there might be occasion . . . I shall follow a precedent so entirely in point, and, declaring that the distribution of the several charitable bequests

under the will is left to the absolute discretion of the several legatees, I decline directing any scheme, leaving to any party liberty to apply as there may be occasion."

The case of *Baker* v. *Sutton* (1836) (1 Keen, 225), stated in the chapter on Indefinite General Words, is inconsistent with this principle. A scheme was there ordered under a gift authorizing an immediate distribution at the discretion of trustees. But the point was not argued (*ante*, p. 200).

Instances of schemes being directed, when the trustees named by the testator died or refused, may be found in *A.-G.* v. *Lawes* (8 Hare, 32) (Nov. 1849) (*ante*, p. 129), where the trust authorized an immediate distribution; and in *A.-G.* v. *Gladstone* (13 Sim. 7) (June, 1842) (*ante*, p. 137), where the Court held that a permanent trust was intended.

CHAPTER XXXIII.

On the Cy-près Doctrine.

In charity cases we are constantly meeting with references to the *cy-près* doctrine. On analysing the cases in which this doctrine is applied, we find that they are divisible into several distinct classes. One clear class of cases is that in which a testator has devoted property for ever to the performance of some charitable purpose for which there is scope at first, such as the release of captives in Barbary—but in the course of time there cease to be any objects of such charity. In these cases it is settled law that property once devoted to charity is so devoted for ever, and on failure of the primary object, the property will be applied to some other charitable purpose.

1. Fund at first applicable, but subsequent failure of objects.

A.-G. v. *Bishop of Llandaff* (cit. 2 M. & K. 583) (March, 1819); *Hayter* v. *Trego* (1830) (5 Russ. 113); *A.-G.* v. *Gibson* (1835) (2 Beav. 317, n.); *A.-G.* v. *Ironmongers' Company* (2 M. & K. 576) (Nov. 1834); *A.-G.* v. *Ironmongers' Company* (Betton's Charity, 1840) (2 Beav. 313); *Incorporated Society* v. *Price* (1844) (1 Jo. & Lat. 498); *A.-G.* v. *Fraunces* (W. N. 1866, 280); *A.-G.* v. *Hankey* (L. R. 16 Eq. 140, n.) (Nov. 1867); *A.-G.* v. *Bunce* (L. R. 6 Eq. 563) (April, 1868); *In re Templemoyle School* (1869) (I. R. 4 Eq. 295); *A.-G.* v. *Stewart* (L. R. 14 Eq. 17) (March, 1872); *In re Prison Charities* (L. R. 16 Eq. 129) (April, 1873); *Spiller* v. *Maude* (32 Ch. D. 158, n.) (July, 1881); *Wilson* v. *Barnes* (38 Ch. D. 507) (May, 1886).

See also *A.-G.* v. *Earl of Craven* (1856) (21 Beav. 392), stated later in this chapter.

In these cases the Court has professed to pick out the nearest purpose to the testator's original intention, which could be

found; and it has been guided in its selection by considering any other charitable objects, to which the testator made bequests.

2. Income at first exhausted, but subsequent surplus.

A second class of cases, in which the *cy-près* doctrine is referred to, comprises those in which property is devoted to some charitable purpose, which exhausts the income at first, but in the course of time the income grows and shews a surplus. These cases are discussed in the chapter on Charge or Trust, and we see that when the whole property is devoted to charity the surplus is applied to increase the original gifts, or to analogous purposes on the *cy-près* principle.

3. Original surplus of income.

A third class of cases is that in which the entirety of certain property is devoted to some charitable purpose which is not sufficient to exhaust the income in the first instance. The surplus income is then applied *cy-près* if it falls to the Court to apply it; that is to say, if its destination is not committed to the discretion of some specified trustee or trustees. Some cases of this class will be found in the chapter on Charge or Trust. (See also *Bishop of Hereford* v. *Adams* (1802) (7 Ves. 324) in the chapter on Poor (*ante*, p. 143).)

4. Original failure of purpose or objects.

There remains yet a fourth class of cases in which the *cy-près* doctrine is dragged in, and a very unsatisfactory class it is also. It comprises a number of cases in which a testator has devoted property to some charitable or quasi-charitable purpose; but owing to some impediment either of law, or of the consent of some person or persons, or the default of some expected set of circumstances, the testator's object cannot be carried out in the manner pointed out by him. The Courts have then held in some cases that the testator had only a particular intention, and that failing, the gift has failed; but in other cases they have held that beyond the particular intention expressed there was a general intention of charity, and then the failure of the particular intention has let in the general intention, and the Court has applied the fund *cy-près*.

The only principle, which we can see, on which such a distinction could be logically based, is this, namely, that when the

Gifts on conditions subsequent and precedent.

gift can be read as devoting the property to charity, and adding a condition subsequent to the gift, then, if the performance of the condition becomes impossible, the gift becomes absolute; whereas, if the condition is precedent to the gift, and the condition becomes impossible, the gift fails altogether. This is a principle well known in private gifts, and it has been recognised also in charitable gifts, and the following cases are good examples of it:—

In *A.-G.* v. *Downing* (1766) (Amb. 549, 571) a testator, by will made before the Georgian Mortmain Act, devised all his hereditaments for several estates for life and in tail, which determined or failed, with remainder to the use of trustees, in trust to purchase with the rents and profits the inheritance of some piece of ground in Cambridge proper for erecting a college, to be called Downing College, and to build suitable edifices, and to obtain a royal charter for the founding of such college, and after the founding and incorporating of the college to stand seised of all the said hereditaments in trust for it. The trustees all died before their estate came into possession, and the defendants entered into possession of the estates, as heirs of the testator. This information was then brought against them, and the charitable use was declared good. Five unsuccessful attempts were then made to obtain a Crown charter, and none being obtained, the cause came on for further directions (sub nom. *A.-G.* v. *Bowyer* (1798) (3 Ves. 714)), and the defendants claimed the rents, at least until a charter should be obtained.

Trust to found college and procure charter.

It was held that the granting of a charter was not a condition precedent to the charitable use, and a scheme should be directed for a college without a charter, and that the defendants must account for all the rents since the death of the last tenant for life.

Subscriptions for building church.

Girdlestone v. *Creed* (1853) (10 Hare, 480). In this case a lady had collected a considerable sum of money for the purpose of building and endowing a church, and had invested some in consols and left the rest in a savings bank at the time of her death:

Held, that the Attorney-General could not enforce the application of the money, but that the same formed part of her personal estate, subject to the right of the subscribers to recover their subscriptions, the purpose for which the same were given having failed.

This case treats a subscription for a charitable object as being dependent on a sufficient sum being subscribed to carry out the object; so that on the collector dying and leaving the collection incomplete, the subscribers became entitled to recover their money.

Yates v. *University College, London* (L. R. 8 Ch. 454) (L. C. Selborne and L. J. Mellish, March, 1873; affirmed in H. L., Feb. 1875 (L. R. 7 H. L. 438)). Bequest of pure personalty after death of testator's wife to University College, London, on trust to pay the annual income thereof to the Professor of Mineralogy and Geology for the time being of that college as an endowment of the said professorship.

This was treated as valid if standing by itself.

Condition that college accept rules.

Further gift of other pure personalty after death of testator's wife "unto the said University College, London, for the purpose of founding in it a new professorship of archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand, and I hereby expressly declare my mind and will to be, that as soon as conveniently may be after my decease my executors shall communicate to the said University College the fact of my said last-mentioned bequest to the said college, and a copy of the said rules and regulations, and the said University College shall within twelve calendar months next after the fact of the said bequest shall have been so communicated by my said executors as aforesaid, signify by writing under the hand of their president, treasurer, or secretary their acceptance of the said rules for the future regulation of the said professorship. And I further declare that if the said University College shall decline or refuse to accept the said rules for the regulation of the said professorship, or shall not within the space of twelve calendar

months signify to my executors in manner aforesaid their acceptance of the same, then I declare that the said bequest and every other legacy and bequest herein or in any codicil hereto contained in favour of the said University College shall be wholly null and void, and the said stock and shares and all other benefits hereby or by any codicil hereto by me intended for the said University College shall sink into and form part of my residuary estate."

The testator never prepared any rules or regulations for the regulation of the said professorship:

Held, that the condition as to acceptance of the rules was subsequent to the gifts to the college and precedent to the gift over to the residue, and therefore on its fulfilment becoming impossible the gifts to the college became absolute, and the gift over failed.

Forbidden religious trusts.

It cannot be said, however, that all the cases included in the class which we are considering are referable to this very intelligible principle. The class includes the cases which have been already mentioned in the chapters on Religious Trusts. In those cases property was devoted to the teaching of some form of religion, as to which legal penalties were annexed at the time. The particular purpose was illegal and could not lawfully be carried out; but the judges went on to hold that there was a general intention of charity which should be carried out, and that the Crown had the right to direct the application of the property. The Courts, in arriving at this conclusion, were no doubt influenced by the statute of 1 Edw. 6, c. 14, vesting in the Crown all property theretofore devoted to any superstitious purpose. The Courts seemed to think that future superstitious gifts should fare as past ones, and they confused together superstitious trusts and trusts to teach forms of religion not sanctioned by the law. This medley appears to have given rise to the class of cases which we are considering. The result is most unfortunate, as it renders an application to the Court indispensable in every case not covered by authority in which a testator's intention cannot be literally carried out; and we therefore find

in the report of every such case an argument by counsel appearing for the Attorney-General, and contending that the fund should be applied *cy-près*.

Doubtful and defunct societies.

The cases of doubtful and defunct societies afford instances of the application of this principle. We have seen in the chapter on that subject that if a gift is made to a society, which cannot be identified and possibly never existed, the fund is applied *cy-près* by the Court (*Loscombe* v. *Wintringham* (13 Beav. 87) (Nov. 1850)). But if a legacy is given to an existing society, which is dissolved before the testator dies, such legacy lapses altogether (*Broadbent* v. *Barrow* (29 Ch. D. 560) (April, 1885); *Fisk* v. *A.-G.* (L. R. 4 Eq. 521) (July, 1867)).

Dependent gifts.

We may also refer here to the chapter on Dependent Gifts, where it will be seen that if land is devised for the site of a charitable institution, and money is left to build on the land and endow the institution, the gift of the money fails as being dependent on the devise of the land, and the fund is not applied *cy-près*.

Doctrine of general intention established in 1803.

A leading case on the subject which we are considering in *Moggridge* v. *Thackwell* (7 Ves. 36) (May, 1803), where Lord Eldon, after reviewing numerous authorities, summed them up by saying, "All the cases prove that where the substantial intention is charity, though the mode by which it is to be executed fails by accident or other circumstances, the Court will find some means of effectuating that general intention."

As this decision is regarded as fixing this indefinite principle in our law, it will be worth our while to discuss the cases on which it is based, and see whether some more definite result cannot be deduced from them.

The cases prior to 1803 considered.

We will take the cases mentioned in the judgment in *Moggridge* v. *Thackwell* in chronological order, and will add in the proper places a few cases bearing on the subject, but not mentioned in that judgment.

The first case is that sometimes called *Frier* v. *Peacock* and reported as *A.-G.* v. *Matthews* (1676) (2 Lev. 167), and *A.-G.* v. *Peacock* (1677) (Finch, 245). This case will be found fully

stated in the chapter on Crown Rights, and will be seen to be a case of a gift to the use of the poor in general. It merely shews that the law will carry out a charitable gift expressed generally, and find some means of giving precision to it (*ante*, p. 417).

The second case is (*Clifford* v. *Francis* (1679)) (Freeman, 330), which is also stated in the chapter on Crown Rights, and shews that effect will be given to a gift to pious uses (*ante*, p. 418).

This third case is more to our purpose, and the following is a statement of it:—

A.-G. v. *Coombe* (1679) (2 Ca. in Ch. 18). J. seised of land in fee and *pur autre vie* devised £10 per annum for ever out of his lands "so long as there shall be a weekly sermon every Saturday in St. Albans to be chosen by the greatest part of the best inhabitants." No sermon had been preached on a Saturday for many years.

The Lord Chancellor held that the mode of selection indicated was a wild direction, but ordered the £10 per annum to be paid and applied to maintain a catechist to be approved by the bishop. He said charity was intended, though a mistaken charity was expressed. He also ordered some arrears of the annuity to be capitalized.

We have already mentioned this case of *A.-G.* v. *Coombe* in the chapter on Religious Bequests, and shewn that it is probably identical with the *Anonymous Case* (2 Freeman, 40), and we can refer to a further statement of it in argument in 2 Vern. 266 (*ante*, p. 120).

It is probable that the preaching of such a sermon was never started at all, and that the decision is to the effect that a direction annexed to a trust for a preacher, that such preacher shall be chosen by the greatest part of the best inhabitants of a town, is void, and leaves the preacher to be appointed as the Court may direct.

The fourth case mentioned in *Moggridge* v. *Thackwell* is *A.-G.* v. *Syderfin* (1683) (1 Vern. 224), which is also mentioned in the chapters on Crown Rights and Incomplete Gifts. In it a testator directed a sum of money to be applied to such charit-

able uses as he had by writing under his hand directed. No such writing was found. It was held that the king had the right to appoint this money in charity. There appears to be no reason for straining this case beyond the ground covered by it (*ante*, pp. 208, 419).

The fifth case is *A.-G.* v. *Baxter* (1684) (1 Vern. 248), which has been already mentioned in the chapters on Bequests for Religious Purposes and for Ministers. We have seen that this case was reversed on a rehearing (*A.-G.* v. *Hughes* (1689) (2 Vern. 105)); and even had it stood, it would have been a case of forbidden religious trusts, which stand on a peculiar footing of their own (*ante*, pp. 120, 134).

The sixth case is *A.-G.* v. *Guise* (1692) (2 Vern. 266), also stated in the chapter on Religious Bequests. It appears that the Court handed over the property to trustees named by the testator, directing them to carry out his intention as nearly as they could. The intention was to educate Scotchmen to be episcopalian ministers in Scotland. There does not appear to be any practical difficulty in this; and the Court, by directing an execution of the trust, must have held that there was no legal objection. This is not really a case of the *cy-près* doctrine at all (*ante*, p. 121).

The seventh case is the *Anonymous Case* (1702) (2 Freeman, 261), already mentioned in the chapter on Crown Rights (p. 419), which is a mere statement of the effect of some of the earlier cases.

The eighth case is one which has no real bearing upon the subject, and merely shews that a trust of residue in a codicil will supersede the trust of the residue contained in the will. The following is a statement of the case:—

Wheeler v. *Sheer* (Mosely, 288) (February, 1730) (L. C. King). Testator by will directed his executors to employ the residue of his estate "to such charitable uses as by codicil I shall appoint." He made a codicil directing the residue to be applied "to such uses and purposes as by any other codicil or codicils shall be directed and appointed," and he made no further appointment. The executors were given £100 apiece out of the residue:

Held, that the charitable trust of the residue in the will was revoked or superseded by the general trust in the codicil, and under the words of the latter, and in view of the legacies given to the executors, the next of kin took the residue undisposed of.

The ninth case is *A.-G.* v. *Hickman* (1731) (2 Eq. Ca. Ab. 193), which will be found stated in the chapter on Religious Trusts. The trust was for the maintenance and education of Nonconformist ministers, and was contained in a codicil framed as a letter to a legatee, saying, "The particular method how to dispose of it I prescribe not, but leave it to their discretion, designing you to take advice of C. and D." The legatee died before the testator, so that his rights lapsed, and C. and D. also predeceased the testator. The letter or codicil having been admitted to probate, operated in the same way as a declaration of trust in the will. Now it is clear that a gift upon trust for private individuals does not lapse by the death of the trustee in the testator's lifetime; but the Court will appoint a new trustee and so preserve the trust. Moreover, if a trustee of a private trust has a power of selection or division amongst several objects, and there is no gift over in default of appointment, then on default happening the Court will exercise the power. It is true that the Court in private trusts divides the fund equally amongst all the objects, and thus practically implies a trust in default of appointment for all the objects equally. But it does this on the theory of exercising the power. The case of *A.-G.* v. *Hickman* appears to be nothing more than an application of this doctrine to charitable trusts. Of course in charitable trusts there is no definite set of objects between whom the fund can be divided equally, and it is therefore necessary to settle a scheme. But this distinction merely arises from the difference in the nature of the two cases. We may add that the clause as to taking the advice of C. and D., in this case, is clearly in the nature of a condition subsequent, and ceased to have any operation on its fulfilment becoming impossible. Lord Eldon, however, in *Moggridge* v. *Thackwell* (7 Ves. 80), comments

on this case as establishing a peculiar doctrine in favour of charities.

The tenth case is *A.-G.* v. *Doyley* (1735) (7 Ves. 58, n., 4 Vin. Abr. 285), which will be found stated in the chapter on Gifts to Poor Relations. This case fully bears out our remarks on *A.-G.* v. *Hickman*. It will be seen that a testator left his estate on trust for such of his poor relations on his mother's side and such charitable uses as his trustees should think fit. The trust for poor relations being immediate was a private gift and not a charity. There was failure of the trustees in some way; and the Court carried out both the private and the public trust, giving half to the relatives mentioned and the other half in charity. These two cases seem merely to establish the rule that a charitable trust, like a private trust, shall not fail through default of a trustee (*ante*, p. 155).

We may here mention a case which is not cited in *Moggridge* v. *Thackwell*, but comes in this place in order of time.

A.-G. v. *Pyle* (1 Atk. 435) (February, 1738, Lord Hardwicke). Will: "Whereas there is now owing to me from S. and Co. the sum of £1000, I do hereby give the said sum to the Company of Coopers to build almshouses at R."

There was only £365 owing from S. and Co. to the testator at his death. Apparently the Coopers' Company had some almshouses somewhere, and £365 was considered insufficient to lay out in buying land and building on it.

The Lord Chancellor ordered the £365 to be invested and the interest to be distributed among the inmates of the existing almshouses of the Coopers' Company.

The eleventh case cited in *Moggridge* v. *Thackwell* is *Baylis* v. *A.-G.* (1741) (2 Atk. 239), which is stated in the chapter on Incomplete Gifts. It will be seen that a legacy of £200, admittedly for charitable purposes, was left to the ward of Bread Street, with the addition of the words "according to Mr. —— his will." The £200 was applied in charity for the benefit of the ward by the Court. This case certainly shews that a charitable gift will not fail by reason of a lacuna left by the testator

in specifying the mode of its application. But it is not a case in which the testator has specified the mode, but the mode cannot be fulfilled. The blank had the effect of leaving the will as if the clause containing it were omitted, and there had been a simple legacy for charitable purposes for the benefit of Bread Street Ward. An incomplete trust is a different thing from a complete trust, which cannot be fulfilled. In carrying out the former nothing is done contrary to the donor's directions; in carrying out the latter *cy-près*, some part of the donor's directions is abandoned. Compare *Mills* v. *Farmer* (1815) (1 Mer. 55; 19 Ves. 483), and other cases stated in the chapter on Incomplete Gifts (*ante*, pp. 208, 209).

The twelfth case is *De Costa* v. *De Pas* (1754) (Amb. 228), which will be found in the chapter on Religious Bequests. It will be seen to be a trust for forbidden religious views, which, as we have mentioned, stand upon a footing of their own. The money was appointed by the Crown, and not applied *cy-près* by the Court (*ante*, p. 122).

The thirteenth case is the following:—

White v. *White* (1778) (1 Bro. C. C. 12) (Lord Thurlow). Testator gave half his residue to the Foundling Hospital, and the other half to the Lying-in Hospital, and if there should be more than one of the latter, then to such of them as his executor should appoint. By the will he appointed A. to be his executor; but he afterwards erased A.'s name from the will. There were several lying-in hospitals at his death:

Held, that the gift to the Lying-in Hospital did not fail, and the master was directed to report to which hospital it should be paid.

Here, certainly, it cannot be said that the power failed for default of the trustee, as it was the testator himself who erased the name. But such erasure only affected the power of selection, and left the prior gift pure and simple. We have seen in the chapter on Doubtful Societies that such a gift standing alone would not fail. The Court would admit evidence to shew which hospital was intended, and, failing such evidence, would divide

the fund equally or rateably amongst all institutions answering the description.

The fourteenth case is to the following effect:—

A.-G. v. *Bishop of Oxford* (1 Bro. C. C. 444, n.) (July, 1786), stated in judgment in *Corbyn* v. *French* (4 Ves. 431, 432) (Sir Lloyd Kenyon). Testator gave the residue of his personal estate to his executors in trust "to apply the same to build a church at Wheatley where the chapel now is, in such manner as I shall hereafter direct, and for want of such direction as my executors shall think best":

Held, by Sir Lloyd Kenyon, that if the bishop, who was parson and patron of the living, objected he could not interfere. As to repairing or altering the trust to endowment he could not do that. The intention must be implicitly followed or nothing could be done. He then referred it to the Master to make inquiries as to the bishop's consent and other matters, and an arrangement for dividing the fund was then made and an order taken by consent. The arrangement was that £3000 should be applied in building the church and forming a repairing fund, £1000 go to form an endowment, and the balance be paid to the next of kin. The final order was made in 1792.

This is certainly an instructive case. The bishop was able to say to the next of kin, "I consent," and so deprive them of the whole fund; and he was able to say to the Attorney-General, "I refuse," and so give the property to the next of kin. He gave his consent on the Attorney-General agreeing to limit the cost of the church to less than £3000, and the next of kin agreeing that the excess of £3000 over the cost should form a repairing fund, and the sum of £1000 be devoted to endowment. And the Court sanctioned this arrangement. This is a clear authority for limiting the *cy-près* doctrine, and is so treated in the judgment of *Corbyn* v. *French*. It shews that when a testator indicates one special object, which cannot be carried out without the consent of a third party, the gift will fail altogether if such consent be withheld.

The only other case mentioned in the judgment in *Moggridge*

v. *Thackwell* is that of *A.-G.* v. *Bowyer* (1798) (3 Ves. 714), the Downing College case, which has been stated in the early part of this chapter. It was held that the grant of a Crown charter was a condition subsequent to the bequest in that case.

Analogous prior cases.

We ought, however, to notice some other cases, which were cited in the argument in *Moggridge* v. *Thackwell*.

Two of these are to the same effect, namely,

A.-G. v. *Goulding* (1788) (2 Bro. C. C. 428), and

A.-G. v. *Whitchurch* (1796) (3 Ves. 141).

In each of these some land was devised for almshouses, and some personalty was bequeathed to endow the almshouses. The devises being made after the Georgian Mortmain Act were clearly void, and it was held that the bequests for endowment were void also, and would not be applied *cy-près*. These decisions accord very well with the doctrine of conditions precedent, and impose another limitation to the proposition that when a charitable disposition cannot be carried out exactly as the testator intended, it will be applied *cy-près*. More cases of this nature will be found in the chapter on Dependent Gifts (*ante*, pp. 330–335).

Dependent gifts.

Gifts void under Georgian Mortmain Act.

We need hardly mention that when a gift is declared void by the Georgian Mortmain Act, it fails altogether and will not be applied *cy-près*. It would have been a clear contravention of the Act to arrive at any other conclusion. The following case decides this :—

Corbyn v. *French* (4 Ves. 418) (Feb. 1799, Master of the Rolls).

Testator gave the residue of his estate to be invested in the funds and the interest paid to his wife for life, adding : " At her decease I direct that the sum of £500 be paid to the trustees of the chapel in Essex Street (whereof the Reverend Mr. Lindsey and the Reverend Doctor Disney are ministers) to be applied by them towards the discharge of the mortgage on the said chapel."

The chapel was vested in trustees for the public worship and service of Almighty God therein, and was duly licensed under the Toleration Acts as a Nonconformist place of worship.

The mortgage on the chapel had been paid off during the testator's life:

Held, that the gift was void on the face of it under the Georgian Mortmain Act, and therefore it would not be applied *cy-près* to repairing the chapel or the like.

Other prior cases.

We will proceed to discuss some other cases mentioned in the argument in *Moggridge* v. *Thackwell*, and which are to the following effect:—

A.-G. v. *Boultbee* (2 Ves. Jun. 379) (July, 1794, Sir R. P. Arden, M.R.), affirmed on appeal, 3 Ves. 220 (July, 1796).

A charity created by deed for the benefit of the vicars of P. provided they should be presented at the recommendation of certain trustees. The trustees neglected to recommend, and the patron presented without their recommendation. Under the terms of the trust the trustees had power to distribute the income of the property in charity if the vicar was not entitled to it:

Held, that the vicar was entitled, as the absence of the recommendation of the trustees arose from their neglect to recommend; but, *semble*, if they had recommended a qualified person in time, and another had been appointed, such other would not have been entitled to the benefit of the trust.

It seems reasonable to read the proviso in this case as subject to the condition of the trustees recommending in reasonable time; and that condition not being fulfilled, the proviso would fail.

Brantham v. *East Burgold*, mentioned in the judgment of Sir R. P. Arden, M.R., in *A.-G.* v. *Boultbee* (1794) (2 Ves. Jun. 388).

"In a case before me the testator directed bread to be distributed to poor persons attending divine service and chaunting his version of the Psalms. They could not be chaunted because not authorized; but I thought his general object was to give the poor people the bread, and the chaunting the Psalms was only accessory, because he thought his version as good as any other."

This case hardly requires comment. It clearly treats the chaunting of the unauthorized version of the Psalms as a condition subsequent, which was illegal and left the prior gift unaffected. The words of the original gift, however, have not been preserved.

In the case next mentioned the proceedings were not completed at the date of *Moggridge* v. *Thackwell*. It will be seen that a charitable bequest failed for want of the consent of a third party, as in *A.-G.* v. *Bishop of Oxford* (1 Bro. C. C. 444, n.), and the residuary legatee and the Attorney-General agreed to divide the fund instead of calling on the Court to decide whether it should be applied *cy-près* or not. The compromise, of course, required and received the sanction of the Court.

A.-G. v. *Andrew* (3 Ves. 633) (March, 1798, L. C. Loughborough).

Testator, by will dated May 15, 1747, directed his 3 per cent. Bank Annuities to be invested in land, and to be settled on certain relatives for their lives and the life of the survivor, and then to the use of Trinity Hall, Cambridge, on trust to found four scholarships for students from Merchant Taylors' School, and accumulate the surplus rents till the accumulations amounted to £20,000, and then lay that sum out in additional buildings, and found four new fellowships for students from Merchant Taylors' School, and apply the further rents for the general use of the college. He gave two other specific items to be added eventually to the Bank Annuities, and gave the college a legacy of £100 and certain plate.

The testator died soon after the date of his will. The legacy of £100 and the plate were paid and delivered to the college; and the Bank Annuities and two other specific items were placed in the joint names of the executrix and the college authorities, and the income was regularly paid to the tenants for life. At last all the life tenants died, and the college desired to disclaim the bequest, considering that the college would be prejudiced by it:

Held, that they were entitled to do so. And *quære*, whether

the effect of their disclaimer let in the residuary legatee or left it to the Court to apply the funds *cy-près*.

The decree left it open to the authorities of Merchant Taylors' School to raise the last-mentioned point by bringing in some specific proposal. The point, however, was never argued, but the case was carried to the House of Lords, which affirmed the Lord Chancellor's decree (Feb. 1800) (3 Ves. 649, n.). The school and the representative of the residuary legatee then agreed to a compromise, whereby about a quarter of the fund was devoted to founding scholarships at St. John's College, Oxford, being a college connected with the school, and the representative of the residuary legatee took the rest. The last-mentioned litigant afterwards brought another suit against the authorities of Trinity Hall, Cambridge, claiming to make them hand over to him the plate and the legacy of £100 which they had received, and account for the profits made on certain interest received by them, though they had accounted for all principal and interest in the first suit. It was held, however, that it was competent for the college to accept one benefit under a will and disclaim another; and that the plaintiff's title was only acquired under the compromise with the Attorney-General, and he was therefore bound by the decree in the first suit, and could claim nothing more in respect of the grounds of that suit (*Andrew* v. *Trinity Hall, Cambridge* (9 Ves. 525) (June, 1804, Sir. W. Grant, M.R.)).

The case of *A.-G.* v. *Bowyer* (3 Ves. 714) (1798), which has been stated in the early part of this chapter, would come next in order of date; and after it the case of *Moggridge* v. *Thackwell* itself (7 Ves. 36) (1803). In the latter a testatrix bequeathed as follows: "I give all the rest and residue of my personal estate unto V., his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters, and I appoint the said M. and V. before mentioned executors of this my will." V. died before the testatrix, and it was admitted that she knew of his death. It was held that the

Moggridge v. Thackwell itself.

charitable direction did not fail by the death of V., but the property would be applied in charity by the Court by means of a scheme in which regard would be had to the testatrix's recommendation of poor clergymen with large families and good characters.

This case really appears to be nothing more than an instance of the rules that the Court will not let a trust fail for want of a trustee, and will direct the application of a fund which is given in charity in a general way, when the precise application of it is confided to a trustee, and such trustee fails to apply it. The case, however, is considered as fixing in our law the very indefinite principle that "if a testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."

Subsequent cases.

We can now proceed to consider the cases subsequent to *Moggridge* v. *Thackwell*, the same being as follows:—

Cherry v. *Mott* (1 My. & Cr. 123) (Jan. 1836, Pepys, M.R.). Codicil: "And whereas it is my intention, if it please God to restore me to health, to see the governours of Christ's Hospital, and to contract with them for the purchase of a presentation of a boy to that charity, the son of a freeman of the borough of Hertford by the mayor and aldermen of the said borough; now, should I not live to make the contract, I beg, if the money arising from my personal estate shall after payment of my just debts, funeral expenses, legacies, legacy duty, and other matters hereinbefore mentioned be sufficient to make the contract, I beg they will do so."

Apparently the residuary estate was sufficient, but the executors offered to the governors a smaller sum than they required, and the governors were not willing to grant a presentation in consideration of such smaller sum.

The judge held that the legacy failed in consequence, and that

it was not a case for applying the fund *cy-près*. He also stated that the Court would not take the statement of the governors as to the sum at which they would have contracted. He also held that the gift would fail because the residue included some impure personalty; and if the contract were made, the purchase-money would be payable rateably out of the pure and impure, and as the impure was inapplicable the contract would not be carried out.

The judgment in this case appears to be very unsatisfactory on all points.

In *Reeve* v. *A.-G.* (3 Hare, 191) (July, 1843, V.-C. Wigram) a testator gave a sum of £1000 stock to the Society for Bettering the Condition of the Poor, upon a fantastic trust for some poor, and a like sum to the Society for the Encouragement of Female Servants, upon a fantastic trust for female servants; a further legacy of £100 stock to the last-named society, upon another fantastic trust. Both societies disclaimed their legacies, and the Court made an order for carrying out the last trust, and directing a scheme for carrying out the first two trusts.

This was merely a case of a trust not failing for default of a trustee.

In *Martin* v. *Margham* (1844) (14 Sim. 230) a testator left all his property to trustees in trust to invest the same in the funds, and after paying certain annuities to add the dividends to the capital until it should produce £600 a year, when he hoped that every five years receipt of that income would produce an increase of income of £150 a year, and his will was that every such increase should be appropriated for the benefit of certain charity schools in a certain order.

The next of kin contended that, as the direction to accumulate exceeded the legal limits, the charitable gifts failed.

The Vice-Chancellor held that the mode of application only failed, but that the property was all devoted to charitable purposes, and a scheme should be settled in which regard should be paid to the objects specified in the will.

This decision may be taken to establish that a direction to

accumulate a fund beyond legal limits, and then apply it in charity, gives it all in charity at once without waiting for the period of accumulation to expire.

Next comes the case of *A.-G.* v. *Vint* (3 De G. & Sm. 704) (Feb. 1850, V.-C. Knight-Bruce). Bequest: "I give and bequeath to my trustees aforesaid £1000 3 per cent. consols, upon trust to pay and apply the dividends to the providing each of the poor inmates of the Dartford Union Workhouse, who shall be above the age of sixty years, with one pint of porter, more or less according to the number."

By the 92nd and 93rd sections of the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, the introduction of fermented liquors into any workhouse was forbidden, except under the direction of the surgeon or the guardians, or in conformity with the rules of the Poor Law Commissioners. The last-mentioned rules did not authorize the introduction of fermented liquors except under some medical certificate.

The Vice-Chancellor said that care must be taken that the law should be obeyed, and that no fermented liquors should be introduced except in conformity with the Act. He ordered the costs of the Attorney-General to come out of the fund, and of the other parties out of the estate, and the residue of the fund to be invested and the income to be paid to the vicar to be applied by him according to the provisions of the will, so far as the same lawfully could be applied, the vicar to account to the vestry once a year, with liberty to apply to the Court in case any difference should arise as to the manner of application of the money.

It will be seen that in this case there was a reasonable probability of the trust being carried out in accordance with the testator's directions.

In *A.-G.* v. *The Earl of Craven* (1856) (21 Beav. 392) certain land soon after the plague of 1666 had been conveyed upon trust, in effect, to be kept ready for use as a plague hospital, and for the reception of plague patients and their nursing, and to serve as a burial-place for those who died. The site had been

moved in 1734 by Act of Parliament, and the new site had been built upon and the representatives of the donor had received the rents. The plague had never reappeared since 1666.

It was held that the land was wholly devoted to charitable objects from the very first, and as those objects failed a scheme would be directed to turn it to account *cy-près*. An account was directed from the date of the filing of the information.

It appears in this case that there never were any objects for the charity originally directed. But it appeared probable at first that there would be objects, so that there was ground for devoting the property in the first instance to preparation for these objects. That being so, the case appears to be one, not of original failure, but of subsequent failure of objects, in which case there is no doubt of the *cy-près* application of the property.

A.-G. v. *Stewart* (L. R. 14 Eq. 17) (March, 1872, V.-C. Malins). It appears in this case that a fund was subscribed for providing a place of public worship in London, where divine service should be performed in the Gaelic language; but the purpose could not be carried out, and an application of the money on the *cy-près* principle was sanctioned by a private Act of Parliament.

The fact that the parties applied to Parliament in such a case seems to shew that they doubted the power of the Court of Chancery to effect their object.

In the case of *Re White's Trusts* (33 Ch. D. 449) (July, 1886) V.-C. Bacon refused to apply the *cy-près* doctrine when a legacy was given to build almshouses, when a proper site could be obtained, and no site was obtained within four years. This case will be found stated in the chapter on Remoteness (*ante*, p. 426).

Finally, we must mention a recent decision affirmed by the Court of Appeal, which reaffirms the power of the Court to apply property *cy-près* on the theory of a general intention being manifested in favour of charity. The case is that of *Biscoe* v. *Jackson*, which first came before the Court on the validity of certain bequests to establish a soup kitchen and cottage hospital in Shoreditch, in such manner as not to violate the Mortmain

Acts followed by further gifts for endowing the institutions (W. N. 1881, 101; on appeal, W. N. 1882, 16). The gifts were held good, or possibly good, and an inquiry was directed, in answer to which the chief clerk certified that the fund could not be applied for the establishment of such soup kitchen and hospital in accordance with the direction in the will. The next of kin then applied for the fund, but Mr. Justice Kay held that the will manifested a general intention to benefit the poor of Shoreditch, and, though the particular mode of application failed, the fund should be applied *cy-près*, and this decision was affirmed by the Court of Appeal (*Biscoe* v. *Jackson* (35 Ch. D. 460) (April, 1887)).

The testator in this case directed his estate to be converted, and out of such part as should be pure personal estate and might by law be bequeathed for charitable purposes he directed his trustees to set aside the sum of £10,000, and as to £4000 part thereof to apply the whole, or such part as they should think fit, and the annual income of the rest in the establishment of a soup kitchen for the parish of Shoreditch, and of a cottage hospital adjoining thereto in such manner as not to violate the Mortmain Acts; such hospital to be provided with not less than four beds for patients whose cases should be of an urgent character, and with all other necessary furniture and appliances; and as to £6000, the residue of the said sum of £10,000 and any portion of the £4000 that might not be required for the purposes aforesaid, he directed his trustees to invest the same and to stand possessed thereof upon trust out of the annual income to pay a woman who should reside at the hospital 15*s.* weekly to attend upon the patients and to pay a sum of £60 a year to a surgeon for such hospital, and to apply the residue of such annual income towards the necessities of the hospital and for the benefit thereof, and of the patients in such manner as the trustees should think fit. He gave legacies to two charitable institutions in Shoreditch and for some other charitable purposes elsewhere.

It is certainly difficult to see the general intention in these very specific directions, but both the judge of first instance and

all the judges of the Court of Appeal held the intention to be apparent without calling upon counsel for the Crown. In the discussion of the case reference was made to some of the cases which have been mentioned in this chapter, and also to *Chamberlayne* v. *Brockett* (L. R. 8 Ch. 206) (Dec. 1872, C. A.). There a testatrix recited: "As I feel all my family the same to me I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ I feel I am doing right in returning it in charity to God who gave it." She then gave all her personal estate, which was all pure, to trustees upon trust to invest it in consols, and thereout make certain small annual payments for charitable purposes, and added, "and my further will and desire is when and so soon as land shall at any time be given for the purpose" that almshouses should be built for ten poor persons in the parish of Southam, and for five poor persons in the parish of Long Itchington, and the surplus of her estate applied in making allowances to the inmates of them:

Effect of recital of intention.

Held, reversing Romilly, M.R., that an intention to give all in charity at once was manifested, and the contingent gifts to arise on the gift of land aliunde were not therefore void for remoteness. An inquiry was therefore directed whether any land had been given, and further consideration reserved.

Lord Romilly, M.R., had held that the gift to build almshouses was void for remoteness, since it was not so limited as necessarily to take effect within legal limits.

That aspect of the case will be found commented on in the chapter on Remoteness. So far as regards the present question, it will be seen that the will in *Chamberlayne* v. *Brockett* contained a recital manifesting a general charitable intention, besides a particular charitable gift, a circumstance which distinguishes it from *Biscoe* v. *Jackson*.

We may here mention another case in which a confused will was held to manifest an intention to devote the whole residue of a large estate to charity.

A.-G. v. *The Painter Stainers' Company* (2 Cox, Eq. 51) (1788, L. C.). A testator left a very confused will and codicil dated 1780 and 1781. The will contained a bequest for releasing ten debtors from prison, apparently as a perpetual annual bequest, but the codicil, after altering several dispositions of the will, continued, "Also the legacy for releasing ten debtors from the four city prisons and the M. prison" "is for to be the payment next Christmas after my decease that year only and 40*s.* to each prison every winter after" "for seven years, but no other money more by mistake placed in my will, but the remainder and residue to other charities for blind and distressed people in the words and manner of annual payments to be as the Rev. Mr. H.'s charity at Christ's Hospital, but to be paid by my residuary legatees, the Company of Painters in London, by their head clerk allowed —— pounds per annum, &c."

Residue held to be general.

The residue amounted to £55,000, and the next of kin claimed it on the ground that the residue mentioned in the codicil was only the residue of the amount expressed to be left by the will for the benefit of debtors:

Held, that the codicil disposed of the whole residue for blind and distressed persons, and a scheme directed in imitation of Mr. H.'s charity.

CHAPTER XXXIV.

On the Effect of the Failure of a Gift.

We turn now to a question which was slightly touched upon at the end of the chapter on Tombs, namely, what is the devolution of property which a testator has directed to be applied for a purpose which is void in law. If the purpose affects the whole of a testator's estate no difficulty occurs; there is practically an intestacy, and the property devolves accordingly. In like manner, if a definite sum is ordered to be raised out of the estate, and the whole of such sum is tainted with void trusts, the sum is not raiseable and the property devolves as if there were no direction to raise it. The cases of *Durour* v. *Motteux* (1 Ves. Sen. 320) (1749); *Rickard* v. *Robson* (31 Beav. 244) (1863); and *Mellick* v. *The President, &c. of the Asylum* (Jac. 180) (1821), which will be found stated *ante*, pp. 77, 78, and 81, are instances of the application of this rule. The case is the same if some definite property is devised or bequeathed for a particular purpose for which it cannot lawfully be given. The particular gift is considered as struck out of the will, and the property included in it falls into the general residue to which it belongs. The following cases exemplify this rule:—

If whole of gift invalid.

Middleton v. *Spicer* (1 Bro. C. C. 201) (March, 1783, Lord Thurlow). Testator bequeathed a leasehold to be sold and the proceeds given to charity, *i.e.* The Society for the Propagation of the Gospel, and he gave legacies to his executors.

The gift to the charity had been held void. No next of kin appeared:

Held, that the executors were trustees for the Crown of the proceeds of the leaseholds.

Shanley v. *Baker* (4 Ves. 731) (July 8, 1799, M.R.) Testator gave a leasehold house to the treasurer for the time being of the Countess of Huntingdon's College, in trust to apply £5 per year for a certain school and the residue of the rents for the college.

The will contained a residuary bequest of personalty.

It was admitted that the above-mentioned trusts were charitable:

Held, that the house passed to the residuary legatees and not to the next of kin.

Wills Act, 1838, as to real estate.

With respect to real estate, the benefit of a lapsed or void devise undoubtedly went to the heir and not to the residuary devisee prior to the Wills Act (1 Vict. c. 36), commencing Jan. 1, 1838. But the 25th section of that Act enacts, "That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

Rules as to real estate.

With respect to real estate, we conceive the following results are established by the cases:—

(1.) That when real estate is devised to one or more persons, and no trust is expressed on the face of the will, but a secret trust for charitable purposes is undertaken by the devisee, the devise of the legal estate is good, but the devisee is held to be a trustee for the real representative. The cases on this point will be found in the chapter on Evasions of the Georgian Mortmain Act (*ante*, pp. 401–416).

(2.) That when real estate is devised upon express charitable trusts affecting the whole estate, the devise of the legal estate is void, and the land passes at law to the real representative.

(3.) That when real estate is devised for mixed purposes, partly valid and partly invalid, the devise of the legal estate is good, and the equitable interest in the invalid portion passes to the real representative.

(4.) That when real estate is devised for purposes which are partly valid and partly invalid, and the invalid purposes are only to commence after the death of the first devisee, such devisee will take a legal estate for life, and the legal reversion on his death will go to the real representative, at least if the invalid purposes taint the whole estate (*Doe* d. *Burdett* v. *Wrighte* (1819) (2 B. & Ald. 710)).

We use the phrase the real representative in this connection to indicate, according to the circumstances, the residuary devisee, or the heir-at-law or customary heir of the testator, or possibly of the last purchaser of the land.

Cases on devises of real estate.

The following cases appear to bear out these conclusions:—

In *Willet* v. *Sandford* (Dec. 1748) (1 Ves. Sen. 178, 186) Lord Hardwicke laid down that a devise wholly upon unlawful trusts was itself void; but that a devise upon trusts partly lawful and partly unlawful was valid as to the legal estate and the lawful trusts, and that only the declaration of the unlawful trusts was void.

Doe d. *Toone* v. *Copestake* (6 East. 320) (May, 1805, K. B.). Testator devised land to trustees to pay debts and legacies, and directed the overplus to be applied by the trustees and the officiating ministers of the congregation of Methodists at L. as they should from time to time think fit. The trustees had paid the debts and legacies and brought ejectment for the land.

It was held that they could recover the land upon their legal title in whatever manner the Court of Chancery might deal with the application of it.

Doe d. *Thompson* v. *Pitcher* (6 Taunt. 359) (Nov. 1815, C. P.). A deed held good as to some land though void under the Georgian Mortmain Act as to other land.

It is stated in this case that the rest of the land had been recovered in ejectment by the plaintiff; but there is a reported case of *Doe* d. *Thompson* v. *Pitcher* (3 M. & S. 407) (Jan. 1815, K. B.), in which an ejectment by the plaintiffs for the land dedicated to charitable purposes is decided against them, on the

ground that the deed complied with the Georgian Mortmain Act and was not avoided by a reservation of a family vault.

Quære, was the decision of 3 M. & S. 407 reversed on appeal?

Doe d. *Burdett* v. *Wrighte* (2 B. & Ald. 710) (June, 1819, K. B.). Testatrix charged certain land with an annuity and devised it to S. in fee, adding, "But my wish and desire is that the said S. do in his lifetime by proper deeds convey" the land subject to the annuity "to some charitable uses to take place at his decease and not before. The particular uses to be limited I leave entirely to his discretion, having the fullest confidence as well in his judgment of the choice of proper objects as in his integrity in the disposal thereof according to the wish by me expressed; but it is my intent and meaning that the said S. shall enjoy the said estate subject as aforesaid to his own proper use and behoof during his life."

By a codicil she charged this estate with a legacy of £1000, payable two years after her death.

It was held that S. took a legal estate for life only, and that the heir of the testatrix could recover the land at his death.

Doe d. *Chidgey* v. *Harris* (16 M. & W. 517) (Feb. 1847, Ex.). A devise to trustees on trust to sell and pay certain charitable legacies. The heir-at-law brought ejectment against the tenants in occupation of the property. They set up the title of the trustees, and the jury found for them. The plaintiff applied for a new trial on the ground that the devise was void under the Georgian Mortmain Act, but this was refused. He also applied on the ground that the trustees had disclaimed the devise, and a new trial was granted on the latter ground.

Young v. *Grove* (4 C. B. 668) (June, 1847). A testator gave real and personal estate to trustees to convert, pay debts, &c., and invest the residue and pay the income to his wife for life, and after her death pay two-thirds of the funds to certain persons and the remaining third to certain charities.

The heir-at-law claimed the rent of the land at law, alleging that the charitable trust avoided the devise altogether. The testator's wife was still living:

Held, that as the trust for the wife was a valid trust, the legal estate was in the trustees of the will and the heir could not recover.

Wright v. *Wilkin* (7 Jur. N. S. 441) (Nov. 1860, Q. B.). A devise on condition of paying certain charitable and other legacies, held to be a devise on trust to pay them, and the heir-at-law not entitled to recover either for a condition broken, or on the ground that the devise was made void by the charitable trust.

Of course this decision left it open to him to claim the amount of the charitable legacies under a resulting trust for him.

Precatory trusts.

Where the trust expressed in the will is of a precatory nature, some difficulty used to be felt, owing to the fact that the Courts of Common Law were not familiar with such trusts; and it is not strange that such a case was brought before the cognizance of the Court of Chancery. It would seem on principle that in such a case the devise of the legal estate should be held void, and that may probably be regarded as settled, though judges do not always state clearly whether they hold a gift void at law as well as in equity, or in equity only.

A case on this subject is :—

Pilkington v. *Boughey* (12 Sim. 114) (May, 1841, V.-C. Shadwell). Testator devised his S. estates in settlement. He then recited that he had purchased the C. estate for the purpose of endowing a private chapel, but that certain difficulties had arisen which prevented him from carrying his intention into effect. He then directed that in case the chapel should not be built and endowed at his death (which happened) the C. estate should be and inure to the use of B. and T., in trust to apply the rents to such purposes as P. or M., or the person or persons for the time being entitled to possession of his S. estates, should in her, his, or their discretion direct or appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of:

Held, that the will contained a clear precatory trust of the whole of the rents of the C. estate for charitable purposes, and

that such trust was void, and the estate would pass to the right heirs of the testator.

Failure of trusts of portion of particular fund.

The cases in which most difficulty arises are those in which the void trusts affect a portion of a testator's estate, or a portion of a sum to be raised out of it. In these cases the earlier decisions had established the following principles: (1) that if an unascertainable portion of a fund or an estate was given upon a void trust, and the residue upon a valid trust, the whole failed; and (2) that if an ascertainable portion was given on a void trust, and the residue upon a good trust, the ascertainable portion did not fall into the particular residue of the fund in question, but into the general residue of the estate. We pointed out, in the chapter on Tombs, that the recent cases there stated rebutted the latter of these two rules, and gave to the particular residue the benefit of the failure of the prior trusts. We can now proceed to inquire how far they affect the former of these rules.

Portion certain.

Portion uncertain.

Rule in *Chapman* v. *Brown*.

The rule itself was considered as being established by the case of *Chapman* v. *Brown* (6 Ves. 404) (July 30, 1801, Sir W. Grant, M.R.). There a testatrix, by will made after the Georgian Mortmain Act, gave the residue of her estate to her executors for the purpose of building or purchasing a chapel for the service of Almighty God, and desired that the chapel might be where it might appear to her executors to be most wanted; and if any surplus should remain from the purchasing or building the same, she requested that it might go towards the support of a faithful Gospel minister, not to exceed the sum of £20 a year; and if after that any further surplus should remain, she desired that the same might be laid out in such charitable uses as her executors should think proper.

This disposition was of course void as to realty and impure personalty, but a contention was raised as to the pure personalty.

The judge held that a trust to build a chapel came within the Georgian Mortmain Act as being a trust to mortize land, and was therefore void, and that the trust for the minister was dependent on the trust to build the chapel, though not so expressed,

and therefore fell with it. And he then proceeded as follows: "Standing by itself a bequest of a residue to be employed in such charitable purposes as the executors shall think proper is a good bequest . . . and therefore the question is, whether that ulterior bequest is to fail because the prior bequest cannot take effect. If it could be reduced to any certainty, how much would have been employed by the executors for the other purposes, the residue ought to be employed under this last direction, viz. for charitable purposes generally. I have considered whether that can be ascertained by a reference to the Master . . . but . . . it is utterly impossible to frame any direction that would enable the Master to form any idea upon it. If she had even pointed out any particular place that might have furnished some ground for inquiry as to what size would be sufficient for the congregation to be expected there; but this is so entirely indefinite that it is quite uncertain what the residue would have been, and therefore it is void for that uncertainty."

The case of *Chapman* v. *Brown* was long regarded as a leading authority upon all the points decided in it; and, in particular, it was followed in 1864 on the point which we are considering in *Fowler* v. *Fowler* (33 Beav. 616), as will be seen in the chapter on Tombs. It will be seen that in *Fowler* v. *Fowler* the Court treated the amount required to repair certain tombs as not being ascertainable. It may well be doubted whether this is good law or good masonry. In the more recent case of *Vaughan* v. *Thomas* (1886) (33 Ch. D. 187) it will be seen that Mr. Justice North treated such a matter as one capable of being verified by affidavit, and not even requiring an inquiry in Chambers. The application, therefore, of the principle of *Chapman* v. *Brown* to a trust for repairing a tomb might very well have been negatived. But V.-C. Wood carried its negation far beyond that by the judgment in *Fisk* v. *A.-G.* (L. R. 4 Eq. 521) (July 12, 1867). The facts of this case and a short statement of the decision will be found in the chapter on Tombs; but it will be necessary now to give a fuller account of the judgment.

The Vice-Chancellor first referred to *Ford* v. *Fowler* (1840)

(3 Beav. 146). In that case a testator left £10,000 to his married daughter, recommending her and her husband to settle it together with such sum of money of her husband's as he should choose for the benefit of his said daughter and her children. It was held that these words raised a precatory trust respecting the £10,000, and that such trust was not affected by the indefiniteness of the allusion to the husband's property. The daughter having died in her father's lifetime the legacy was divided equally amongst her children.

This decision appears to be very good sense, but it only establishes that where a good trust is declared of a definite sum and also of something indefinite, the failure of the latter on the ground of its indefiniteness will not cause the former to fail also.

The judgment in *Fisk* v. *A.-G.* next gives a short summary of the case of *Mitford* v. *Reynolds* (1 Phillips, 185, 706; 16 Sim. 105) (1841–1848). A sufficient account of this case will be found in the chapter on Tombs. It will be found to involve a decision that the amount required for a certain purpose there set out was ascertainable (*ante*, p. 79).

The rule questioned.

The Vice-Chancellor then states that he has found a case "after which I must hold that the authority of *Chapman* v. *Brown* cannot prevail except in exactly similar circumstances. I mean the decision of the House of Lords in *The Magistrates of Dundee* v. *Morris*" (3 Macq. 134) (May, 1858). The Vice-Chancellor then proceeds to comment on that case, which may be found stated in this book in the chapter on Incomplete Gifts. As the result of his comments he states: "The result was that their Lordships were of opinion that the will furnished a sufficient means of ascertaining the amount of the legacy." This result would not overrule *Chapman* v. *Brown*, but would merely decide that the facts of *The Magistrates of Dundee* v. *Morris* did not come within the principle of *Chapman* v. *Brown*. On looking into the two cases a clear point of distinction will be seen. In *Chapman* v. *Brown* the purpose was clearly void, and the decision was that the amount required for it could not be ascertained

without actually carrying it out. In *The Magistrates of Dundee* v. *Morris* the purpose was clearly good, and the only question was whether the purpose was expressed with sufficient definiteness to justify the Court in saying that it should be carried out. The question of estimating the cost without actually carrying the purpose into effect did not arise (*ante*, p. 211).

Returning to *Fisk* v. *A.-G.* the Vice-Chancellor says that, following *The Magistrates of Dundee* v. *Morris*, he ought, if the gift of the residue had been exclusive of the amount required for the repair of the grave, to have ascertained the amount required for the void purpose; but that the better construction is that the whole of the gift is to be taken by the rector and churchwardens. The Vice-Chancellor had indicated this conclusion at the beginning of his judgment, and observed: "The gift is not to the executors to do certain things and pay the residue to the rector and churchwardens, the gift is out and out to the rector and churchwardens, and then there is a gift of a portion for a purpose which fails." He also observes that the sums required to keep the grave in repair would be small, especially as the repairs were not to be made annually, but only from time to time; but later on he points out that the smallness of the amount cannot affect the principle of the case.

Particular residue augmented.

It will be seen, on referring to the chapter on Tombs, that *Fisk* v. *A.-G.* has been regularly followed, though not always approved; and the later cases have also settled that the circumstance of the executors being directed to perform the void trust, and pay the surplus to other trustees for the good trust is immaterial, and that in that case also the income released from the void trust falls into the ulterior trust (*Dawson* v. *Small* (1874) (L. R. 18 Eq. 114); *In re Williams* (1877) (5 Ch. D. 735)).

We may call attention here to a point which we shall discuss later on, namely, that a gift over, in the event of a particular trust being held invalid, is perfectly lawful; so that, when there is no gift over, the task to be performed by the Courts is to ascertain the presumed intention of the testator, and to settle the rules of construction accordingly. The cases must be taken

to settle that, when a definite portion of a fund is affected with a void trust, and the residue is given upon a good trust, the portion affected with the void trust falls into the particular residue.

As to particular residue of real estate.

There appears to be no reason for applying different rules to real and personal estate in this respect, but the cases which have established the rule were all cases of personal estate, and real estate is subject to the express words of sect. 25 of the Wills Act (1 Vict. c. 36), which have been set out above. We will, therefore, mention a case in which, prior to that Act, a different result was arrived at, under a devise of real estate.

Jones v. *Mitchell* (1 Si. & St. 290) (Feb. 26, 1823, V.-C. Leach). Testatrix devised real estate to trustees on trust to sell and thereout apply £800 for charitable purposes, and invest £60 to keep in repair certain family vaults or tombs, and pay the rest of the proceeds to R. The £60 is not further mentioned in the report, but as to the £800 it was:

Held, that it went to the heir-at-law, and not to R.

The costs were thrown rateably on the £800 and the surplus.

A similar decision was given in *Arnold* v. *Chapman* (1748) (1 Ves. Sen. 108) (Lord Hardwicke). There a testator gave £100 and all his books to A. and B., and appointed them executors. He gave a copyhold to C., he causing £1000 to be paid to the executors, and he gave the residue of his estate, after payment of debts and legacies, to the Foundling Hospital. The will was made after the Georgian Mortmain Act. The £1000 was claimed by the executors, the next of kin, the devisee, and the heir; while the charity asked to have it applied in payment of debts.

It was held that the heir took the £1000 as a charge well made on the estate, but not well disposed of.

The Wills Act merely substitutes the residuary devisee for the heir in these cases, if there is a residuary devise; and it may be doubted whether the recent decisions on personal estate can be held to apply to a case of a particular residue of real estate.

We would next call attention to the judgment of Jessel, M.R., in *In re Birkett* (1878) (9 Ch. D. 576). The facts of this case will be found in the chapter on Tombs. The Master of the Rolls considered the case as governed by *Fisk* v. *A.-G.*, and the cases which followed it, and he decided accordingly. In his comments on the cases, he expressed an opinion that the amount required to repair a tomb ought to be treated as being ascertainable; and he further stated that he considered *Chapman* v. *Brown* to be good law, and in nowise overruled by *Magistrates of Dundee* v. *Morris*. "In that case," he said, "the House of Lords thought there was sufficient limitation pointed out by the will as to the charitable object to enable them to ascertain the amount required to be applied for carrying out that object. But in *Chapman* v. *Brown*, Sir W. Grant was of opinion that there was not enough to enable him to decide; and . . . . in my opinion Sir W. Grant was clearly right. . . . . The purpose in the case of *Chapman* v. *Brown* was this. The testatrix gave the residue of her estate to her executors '*for the purpose of building or purchasing a chapel for the service of Almighty God.*' Now could any human being say what would be reasonable for the purpose of building such a chapel? You might have any kind of chapel; you might have something very much like a barn, ... or you might have a beautiful chapel resembling, for instance, La Sainte Chapelle, in Paris, or the Sistine Chapel at Rome. . . . The executors had a discretion. The testatrix said that there might be an overplus, and if there was they might devote it to something else; but from the nature of the gift the whole of the residue might well have been applied to building the chapel. It appears to me, therefore, that there is nothing in the authority of *Magistrates of Dundee* v. *Morris* which at all interferes with *Chapman* v. *Brown*, the principle being, that if you cannot fairly ascertain what is the extreme sum required for the first purpose, so that you may properly apply the whole property given to the first purpose, then, of course, if the first purpose is void, the contingent surplus cannot be ascertained, and the whole gift fails."

Rule in *Chapman* v. *Brown* revived.

This appears to be a satisfactory statement of the law on the main point, which we are considering.

This view has been adopted by Mr. Justice Kay in *In re Taylor's Estate, Martin* v. *Freeman* (Feb. 8, 1888) (W. N. p. 32). There a testator, by deed inrolled, conveyed a piece of land to trustees for the erection of a hospital for ten poor persons; and by will left the residue of his property to the trustees on trust to build and maintain the hospital, and invest the remainder, and pay the inmates £18 per annum each, and more if they thought fit, and directed them to apply any balance of income "to or for the benefit of aged or deserving poor of either sex, as out-door pensioners, as they should think fit." The testator died within a year after the execution of the deed, so that such deed became void, and the trust for building the hospital and paying money to its inmates failed as dependent on it. A question was raised, however, as to the validity of the ultimate trusts, but the judge approved of *Chapman* v. *Brown*, and held that the ultimate trust failed on the principle of that case.

The case of *A.-G.* v. *Davies* (9 Ves. 535) (1802–1804) is sometimes cited on questions of this nature, but it is really a decision on the point of mortizing land, and will be found mentioned in this book under that subject (*ante*, p. 320).

Other instances of rule.

There are, however, several cases which appear to stand with *Chapman* v. *Brown*, and may consequently be regarded as authorities on the present point. These are as follows:—

Limbrey v. *Gurr* (6 Mad. 151) (July, 1819, V.-C. Leach). A testator, by deed executed more than a year before his death, assigned land held for 991 years to trustees upon trust that they would after his death erect almshouses at the expense of his estate.

It was held that this was void under the Georgian Mortmain Act, because it did not take effect in possession, but left a resulting trust for the donor during his life.

The said testator by will left £7000 stock to pay for his funeral and monument, and build eight houses upon the land in question, and declared other trusts of the residue. He made an

estimate, shewing a probable surplus of £1600, but added that the residue would be wholly uncertain, not only in respect of the uncertain price of stocks, but because he left, with respect to the prior expenses, an absolute discretion in his executors.

The trusts for funeral and monument were held good; but the trust to build houses failed, as dependent on the land; and the trust of the residue failed on account of its uncertainty.

The testator gave a further sum of £8000 on trust to pay certain weekly sums to certain poor persons, being, according to the view taken by the Court, the inmates of the almshouses; then to give a quartern loaf weekly to twenty other poor persons; then to pay the rent, taxes, and repairs of the almshouses; and the residue to be applied upon other trusts.

The trust for the bread was held good; but the trusts for the inmates of the almshouses, and the rent, taxes, and repairs of the same failed with the houses; and the trust of the residue was held to fail, because it was incapable of being ascertained except by the actual execution of the prior purposes.

He gave a further sum of £7000 on trust, to apply the income in distributing bread; and appointed the same persons governors of all his charities, giving them the nomination of the recipients; and directed a clerk to be appointed at £20 per annum for conducting the business of all the charities in a room to be built at the almshouses, and called the committee-room:

Held, that the trust of the £7000 was good, and was not so connected with the prior void gifts as to fail with them. The judge considered the clerk and the room to be mere incidents collateral to the last charity, and not essential to it.

Attorney-General v. *Hinxman* (2 Jac. & W. 270) (Dec. 1820, Sir T. Plumer, M.R.)

Testator devised a copyhold house, held for lives, and presumed by the judge to be renewable, to his sister for life, and then to trustees in trust, that it might be appropriated to the use of the master that might be appointed to a school for the instruction of poor persons belonging to the parish of Week. He desired the house to be repaired out of his personal estate. He

also directed £2000 to be invested in the names of the minister, churchwardens, and overseers of Week, who should apply the income, or such part as they should think necessary, "in procuring a master and mistress for instructing poor children in reading, writing, and needlework, and bringing them up in the principles of the Established Church, and keeping the schoolhouse in decent repair. And upon this further trust that they do pay, apply, and distribute the residue, if any, of the said interest and produce after payment of the expenses of the said school as aforesaid, unto and amongst such poor families and persons, parishioners of and resident in Week aforesaid, at such times and in such proportions as the said minister, churchwardens, and overseers shall think proper." He added another £1000 to the £2000 by a codicil:

Held, that the trusts of the £3000 for the school failed as dependent on the void devise of the land, and the ultimate trust of the £3000 failed, because the primary trust was uncertain in amount and undefined.

Cramp v. *Playfoot* (4 K. & J. 479) (July, 1858, V.-C. Wood). Testator devised a piece of ground adjoining a certain chapel to trustees for a school, and gave his executors £400 "upon trust that they should, as soon as conveniently could be after his death, lay out and expend the same, or such part thereof as might be necessary, in the erection of a schoolroom and requisite offices on the said piece of ground; and in case any part of the £400 should not be expended for that purpose, he directed that the same should be laid out in and towards the necessary repairs of the said chapel, at the discretion of the trustees thereof."

The gift of land was of course void, and the first trust of the £400 fell with it. The last trust was held to fail also, on the principle of *Chapman* v. *Brown*. The judge observed that it was clear that the whole £400 might well have been employed in building a school.

Some other points occurring in the cases on tombs call for comment. In *Hoare* v. *Osborne* (L. R. 1 Eq. 585) (1866) the income of £600 was given on trust to—(1) repair a monument

in a church; (2) repair a vault in a churchyard; and (3) repair a window in the church; and (4) the surplus was given to the repairs of the church. Trust No. 2 was held void, and the others good, and one-third of the fund was held to be applicable for the void object on the ground that it was impossible to ascertain the requisite amount, and the fund must therefore be considered as divisible equally between the three primary objects. There is no doubt that this case is now overruled as to the destination of the void portion; and it may possibly be overruled on the mode of computation of the amount. We have seen that Jessel, M.R., in *In re Birkett* (9 Ch. D. 576) expressed an opinion that the amount required for the repair of a tomb was ascertainable; and North, J., in *Vaughan* v. *Thomas* (33 Ch. D. 187) had to deal with a case of income given for repair of a tomb and a churchyard, and ordered the amount required for the tomb to be verified by affidavit. On the other hand, it may be remarked that in *Vaughan* v. *Thomas* the trust for the tomb was placed *pari passu* with a trust for an object of much greater extent, where an equal division appeared to be out of place; while in *Hoare* v. *Osborne* it ranked *pari passu* with two objects of almost similar calibre. Furthermore, the word "ascertainable" has two different senses—(1) ascertainable with legal certainty, and (2) ascertainable with mathematical precision. The amount required for the repair of a tomb is ascertainable in the first of those senses, but not in the second; and it may well be held that when several such objects of like calibre are placed *pari passu*, the principle of equal division shall prevail, but that when the objects are manifestly unequal an assessment shall be made on the basis of the legal certainty of their amounts.

What is ascertainable.

We will add here another recent case exemplifying the modern rule that a particular residue gets the benefit of the failure of a prior trust affecting the particular property, namely *Champney* v. *Davy* (11 Ch. D. 949) (Feb. 1879, V.-C. Hall).

Particular residue.

Testatrix, who lived three months after making her will, gave a mixed bequest of pure and impure personalty upon trust to

convert, pay debts, expenses, and legacies, and invest the residue and pay the income to W. (since deceased) for life, and after her death upon trust as to £2000, part thereof, "to pay the same to the vicar for the time being of M., to be by him applied and disposed of in such manner as he in his absolute discretion should think proper in or about restoring, altering, and enlarging and improving the church, parsonage-house, and school attached thereto"; and as to the residue thereof upon the trusts thereinafter declared of the proceeds of her real estate. She then gave the residue of her personal estate to W., and the proceeds of her real estate to the children of D. equally.

The church was already in mortmain.

An inquiry directed whether the parsonage-house and school were already in mortmain, and what amount would be required for restoring, altering, enlarging, and improving such of the three objects as were in mortmain; and *semble*, the legacy was valid to that extent so far as objects were concerned, but bad as to the rest. Then the valid part of the legacy would be apportioned over the pure and impure personalty, and paid as to the proportion of the pure, and as to £500 out of the impure; and so much of the £2000 as failed fell into the particular residue.

The reason for holding void an immediate gift to repair a private house and school is by no means clear. The gift was held good as to £500 of the impure personalty under the Act 43 Geo. 3, c. 108.

If no residuary gift.

When there is neither a particular residuary gift, nor a general residuary gift, or if a share of residue fails, then the property, so far as it represents realty, goes to the heir, and so far as it represents personalty it goes to the next of kin. The right of the heir is not ousted by a trust in the will for conversion of the property into personalty. A good case on this point is *Hopkinson* v. *Ellis* (1846) (16 L. J. N. S. Ch. 59). In that case a testator directed his debts and funeral and testamentary expenses to be paid out of his personal estate, and gave his residuary estate, comprising realty and both pure and impure

personalty, to trustees on trust to convert and pay his debts and funeral and testamentary expenses and some charitable legacies and some private legacies and annuities; and if there should be any surplus, he directed his trustees to pay it to such needful charitable institutions as they might select.

Trust for conversion in will does not oust heir.

It was held that the mixed fund was applicable rateably to pay the debts and funeral and testamentary expenses and legacies; and that each charitable legacy failed to the extent of the proportion which the realty and impure personalty bore to the whole fund; and that the portion corresponding to the realty went to the heir-at-law, and the portion corresponding to the impure personalty to the next of kin. The costs of all parties as between solicitor and client were allowed out of the mixed fund.

It is observable that in this case there were two trusts for payment of debts, &c., one out of the personalty, the other out of the mixed fund; and the latter was held to prevail.

If land is settled to such uses as A. may by will appoint, and in default of appointment to the use of B., and A. appoints it to trustees on trust to sell and pay legacies, and gives the residue in charity, a trust of such residue will result for B. (*A.-G.* v. *Ward* (1797) (3 Ves. 327)).

Effect of void appointment.

CHAPTER XXXV.

On the Effect of a Gift over on Failure of a Prior Gift.

We now proceed to examine the cases on the validity of a gift over in the event of the failure of a prior gift.

We will first notice *A.-G.* v. *Tyndall* (2 Eden, 207 ; Amb. 614) (March, 1764, L. C. Henley).

A *cy-près* direction held void.

Testatrix by will, made after the Georgian Mortmain Act, devised her freeholds and leaseholds to trustees to sell, and out of the proceeds to buy a site at B., and erect an almshouse, and invest the rest in land, and out of the income pay allowances to twenty designated poor people, with power to make an interim investment in Government securities, with the following clause added : "And in case my intention cannot by law take place the trustees are to lay out the money to such charitable uses, intents, and purposes as near to my intention as can be, and the laws will permit." She then gave the residue of her estate to such uses, intents, and purposes as aforesaid :

Held (1) that the heir-at-law took the freeholds ; (2) that the leaseholds fell into the residue and were not applicable for payment of debts in exoneration of the pure personalty ; (3) that the trust to build an almshouse could not be effectuated by the gift of a site by some other person ; (4) that the gift of the residue was void on the ground that the words referring back to the former part of the will included a direction to lay it out in land ; and (5) that the *cy-près* clause was a fraudulent and void clause, inserted to intimidate the heir-at-law and next of kin, and prevent them opposing the charity.

We will next state the case of *A.-G.* v. *Earl of Lonsdale* (1 Sim. 105) (Jan. 25, 1827, V.-C. Leach).

A. built a school-house upon land of which he was tenant for life, and then by deed in 1697 conveyed the school-house and certain land of his own to trustees on trust for keeping up the school. The remainderman diverted the school to other purposes:

Held, that the trusts of the deed thereupon failed.

A., also by will made in 1698, devised the same lands, without the school-house, on trusts for the maintenance of the school, adding, "or otherwise upon such trusts and for such other purposes as his executors should think most conducing to the good of the county of W., and especially of the parish of L." He also by will conferred benefits on the remaindermen. Alternative trust.

It was held that the trusts of the will for the maintenance of the school failed by reason of its diversion, and that the remaindermen were not put to any election, inasmuch as the will contained no gift of the school. On the alternative trust the judge said: "This amounts to a clear direction, that if, for any reason, the testator's intention as to the school should fail, the lands should be applied to other charitable purposes." And he directed a scheme to be settled accordingly. Election.

It will be observed that in this case the prior trust failed, not through illegality, but by reason of the extinction of its object. No doubt has ever been entertained of the validity of a gift over in the event of a prior trust failing on a point of fact. (Compare *A.-G.* v. *Goddard* (T. & R. 348), *ante*, p. 325; also *Christ's Hospital* v. *Grainger* (1 M. & G. 460), *ante*, p. 428.) Failure in fact.

The case, however, which established the validity of a gift over in the event of a prior trust being void for illegality was *De Themmines* v. *De Bonneval* (5 Russ. 288) (Nov. 17, 1828, M.R.). The case will be found fully stated in the chapter on Religious Trusts (p. 125), and it will be seen to be a clear decision on the point. A prior trust was held void, and the fund affected by it was held to belong to the person named in the gift over. The following more recent decisions have followed the same principle:— Failure in law.

Cawood v. *Thompson* (17 Jur. 798) (May, 1853, V.-C. Stuart).

Testatrix by codicil declared that in case the several bequests given by her will, or any of them, or any part thereof, should happen to fail by reason of any part of her estate being of such a nature as could not legally be made applicable to the purposes therein specified in that behalf, then and in that case she gave and bequeathed such part of her said estate as could not legally be made applicable for such purposes unto and equally between T. and H. for their respective absolute use and benefit, and if either died in her lifetime she gave the whole to the survivor, having full confidence that they, or he, as the case might be, would desire to carry out her intentions to the utmost of their or his power; but she nevertheless declared that that should not have the force or effect of imposing a trust on the said T. and H., or either of them, or in any manner abridge or qualify their, or his, property and interest in the bequest thereinbefore contained, any rule of equity to the contrary notwithstanding. There was not sufficient pure personalty to pay all the charitable legacies:

Held, that H. and T. took as much of the impure personalty as would have made up the charitable legacies.

Carter v. *Green* (3 K. & J. 591) (July 30, 1857, V.-C. Wood). Testator made some charitable gifts by will.

By a codicil, after reciting that he had by his will and other methods settled and disposed of some parts of his personal estate to charitable uses, he declared that in case any part or parts of the same should by any statute or law then in being be considered not to have their full operation for the intents and purposes for which he had designed them, then and in such case he gave and bequeathed all such moneys, personal estate, and effects to A., B., C., and D., their executors, administrators, and assigns absolutely and for ever, free from any trust or condition whatever, expressed or implied:

Semble, that this gift over was good.

In *Thrupp* v. *Collett* (No. 1) (1858) (26 Beav. 125) there was a gift for the relief of poachers, and a gift over if it was unlawful; the first gift was held to be unlawful, and it is clear that no objection was raised to the gift over.

In *In re Hyde's Trusts* (W. N. 1873, 202), mentioned in the chapter on Doubtful and Defunct Societies, effect was also given to a gift over of a legacy to a society, which could not be identified (*ante*, p. 239).

A similar decision had also been given in a case prior to *A.-G.* v. *Tyndall*, that is to say,

In *A.-G.* v. *Tanered* (Amb. 351) (Nov. 1757) there was a devise of land on trust for students of Lincoln's Inn, with a gift over in favour of the colleges at Cambridge, if the first trust was void under the Georgian Mortmain Act, and the gift over was held good.

A.-G. v. *Tyndall* distinguished.

We may observe, however, that *A.-G.* v. *Tyndall* is not necessarily inconsistent with these later cases. The facts in it were peculiar. There was, first, a devise of realty and impure personalty for charitable purposes; then a gift over to the nearest lawful purposes; and then a gift of residue, including pure personalty, to the purposes declared by the earlier part of the will. The only lawful way of giving effect to the gift over of the realty and impure personalty would have been to have given these properties to the charities excepted out of the Georgian Mortmain Act. The residue would then have followed the same destination. The Court might well shrink from a result so far removed from the objects contemplated by the testatrix. The judgment, however, appears to be somewhat hasty in several respects, and cannot be relied upon as an authority.

In connection with this subject we ought again to call attention to points which are discussed in other parts of this book, namely, that if trustees are directed to apply money at their discretion for a charitable purpose or an indefinite purpose, the gift is void (see the chapter on Indefinite Gifts, General Words).

But if trustees are directed at their discretion to apply a fund for a purpose which may offend the Georgian Mortmain Act, or for an alternative purpose which does not, the latter clause is good (see the chapter on Mortizing, section on Alternative Trusts, *ante*, pp. 322–327, 328–329).

But if the trust is absolute for the acquisition of land, and

there is merely an alternative of an interim investment in personalty, this alternative does not save the trust (p. 324).

Failure in fact does not mean law.

To this we may add, that if the trust is for the acquisition of land, with a gift over to some other purpose, if there is a physical difficulty in obtaining the land, the gift over will not be held to apply to the legal impediment presented by the Georgian Mortmain Act, and the gift will consequently fail. This is established by the following case :—

A.-G. v. *Hodgson* (15 Sim. 146) (March, 1846, V.-C. Shadwell). Testator bequeathed his residuary personal estate to his executors, "in trust for the establishment or institution of a charitable receptacle if the same can be done for twenty-seven poor old men of England and the same number of Ireland, to be under the management of the Roman Catholic Bishop of London and the Roman Catholic Bishop of Dublin; but if no such institution can be conveniently established, I request that the same may be disposed of in charitable donations to persons of the same description of £6 each, and whenever an opportunity offers that it may be added to any contribution for a similar purpose, £30 of which sum I give to each of my executors":

Held, that the primary gift was void, as involving the purchase of land, and the alternative gift was only to arise if some physical impediment prevented the execution of the primary gift, which was not even alleged to be the case.

CHAPTER XXXVI.

On Marshalling Assets.

Court will not marshal for charity

The judges of the Court of Chancery long ago laid down a rule that they would not marshal assets in favour of a charity. They meant thereby that they would not alter the mode in which assets were applied in payment of costs, testamentary expenses, debts, and legacies, in order to help to pay charitable legacies in full.

General mode of applying assets.

According to the general rule of the Court, the personal estate, not specifically bequeathed, was applied first in defraying these outgoings; and, prior to the Georgian Mortmain Act, no difference was made between pure and impure personalty in this respect. When the Act supervened, it became necessary to settle how the pure and impure personalty were to be applied *inter se*. For instance, if a testator gave the ultimate residue of his personal estate in charity, then if the pure pesonalty were applied first in paying debts and other outgoings, there might be only impure personalty left, and the charities would get nothing. Whereas, if the impure were first applied, the ultimate residue might consist entirely of pure personalty. The Court solved this question by applying the pure and impure rateably, according to their relative values, in paying debts and funeral and testamentary expenses, and general costs, and then gave the charity so much of the residue as represented pure personalty, and paid out of the same fund any special costs relating only to the charitable bequest (*A.-G.* v. *Hurst* (2 Cox, 364) (June, 1790, M.R.)). (See *ante*, p. 253.)

In some early cases Lord Hardwicke marshalled assets in favour of charities: see

A.-G. v. *Lord Weymouth* (Amb. 25) (Feb. 1745): a case of a pecuniary legacy.

A.-G. v. *Graves* (Amb. 158) (Dec. 1752). This was a gift of residue, and it appears from a paragraph on page 218 that the impure personalty was applied first in paying debts.

A.-G. v. *Tomkins* (Amb. 216) (March, 1754): like the last.

And a similar decision was given in *A.-G.* v. *Caldwell* (Amb. 635) (Dec. 1768, M.R.).

But Lord Hardwicke himself pursued a different course in *Mogg* v. *Hodges* (2 Ves. Sen. 52) (Nov. 1750); and other judges, also, were opposed to marshalling assets in favour of charities, and their views prevailed. See

A.-G. v. *Tyndall* (2 Eden, 207; Amb. 614) (March, 1764, Lord Northington); *Waller* v. *Childs* (Amb. 524) (Nov. 1765, M.R.); *Foster* v. *Blagden* (Amb. 704) (Nov. 1771, Smythe, B.); *Hillyard* v. *Taylor* (Amb. 713) (Feb. 1773, L.C.); *Ridges* v. *Morrison* (1 Cox, 180) (April, 1785, M.R.); *A.-G.* v. *Hurst* (2 Cox, 364) (June, 1780, M.R.); *A.-G.* v. *Earl of Winchelsea* (3 Bro. C. C. 373) (Nov. 1791, M.R.); and *Makeham* v. *Hooper* (4 Bro. C. C. 153) (Dec. 1792, Lord Ashurst).

Mixed fund, how applied.

The case is the same if a testator creates a mixed fund for payment of debts and other matters, and gives the balance of it in charity. Thus, in *Howse* v. *Chapman* (4 Ves. 542) (April, 1799) a testator directed his executors to convert certain specified property, and thereout "pay and discharge my just debts, legacies, funeral expenses, and charges attending the probate and execution of the trusts of this my will;" and he gave balance of such moneys in charity. He did not purport to dispose of the residue of his personalty, and some of the specified property was impure personalty.

The Lord Chancellor directed the unbequeathed residue to be applied first in payment of debts, expenses, and costs, and the mixed fund of pure and impure specified property to be applied rateably in paying the rest of the same outgoings; and then awarded the proportion of the surplus representing pure per-

sonalty to the charity, and the proportion representing impure to the next of kin.

Meaning of unbequeathed.

This case shews the difference between personalty unbequeathed and personalty invalidly bequeathed.

Mode of paying charitable legacies.

The rateable application of pure and impure personalty was carried further, and it was held that, in the absence of express direction, every legacy, charitable or private, was payable rateably out of the pure and impure personalty; and the result was that, under such circumstances, a charitable legacy failed to the extent of the proportion which the impure bore to the pure. We believe that many charitable legacies might be made to abate under this rule, but that it is often neglected in practice, the residuary legatees being more favourable to charities than the law is. The rule, however, is well established, and is applied by the Court. Moreover, if the testator has created a mixed fund of realty as well as personalty for the payment of legacies, the charitable legacies will fail to the extent of the proportion of realty and impure personalty included in the fund. (See *Hopkinson* v. *Ellis* (1846) (16 L. J. N. S. Ch. 59), stated in the chapter on Effect of Failure, *ante*, p. 478.)

The application of these rules as to pecuniary legacies was challenged in the case of *Hobson* v. *Blackburn* (1 Keen, 273) (July, 1836), but Lord Langdale, M.R., held that the rule was firmly settled and could not then be re-opened, and the rule has been regularly applied ever since:—

Johnson v. *Woods* (2 Beav. 409) (Feb. 1840, Lord Langdale); *Johnson* v. *Lord Harrowby* (John. 425) (July, 1859, V.-C. Wood); *Fox* v. *Lownds* (L. R. 19 Eq. 453) (Feb. 1875, Jessel, M.R.); *Champney* v. *Davy* (11 Ch. D. 949) (Feb. 1879, V.-C. Hall).

Lord Cottenham, in a case of *Williams* v. *Kershaw*, stated the rule to be, to appropriate the fund as if no legal objection existed as to applying any part of it to the charitable legacies, and then holding so much of the charitable legacies to fail as would in that way come to be paid out of the prohibited fund (1 Keen, 274, n.).

Time at which values fixed.

In *Robinson* v. *Governors of the London Hospital* (10 Hare, 19) (Feb. 1853, V.-C. Wood) a question was raised whether an apportionment of charges amongst different parts of a mixed fund should be made according to their respective values at the death of the testator, at the date of the decree, or at the time of making the apportionment; and the Vice-Chancellor decided in favour of the latter view on account of the difficulty and inconvenience of going back to an earlier date.

Pure personalty clause.

These rules against marshalling have led to the practice of inserting in charitable wills a clause directing the charitable legacies to be paid out of the testator's pure personalty.

We will proceed to consider the effect of such a clause. We may premise that the addition of such a clause to a legacy in a will will not attach it also to a second legacy to the same object in a codicil (*Johnson* v. *Lord Harrowby* (John. 425) (July, 1859)); and that the general effect of the clause is to leave the pure personalty to bear its share of debts, expenses, and costs, but to give the charitable legacies a prior right to payment out of the rest of it. Further words must be added to exonerate pure personalty from its share of debts, expenses, and costs. Instances of this will be found below.

An early instance of such a clause is found in

A.-G. v. *Lord Mountmorris* (1 Dick. 379) (June, 1765). "M. by his will charged his real estate with the payment of his debts and legacies, except three legacies given for charitable purposes, which three legacies he directed to be paid out of his personal estate.

"Lord Northington, C., decreed the charity legacies to stand in the place of the specialty creditors for what they should exhaust of the personalty estate."

We have reproduced this report verbatim. It does not shew very clearly either the words of the will or the effect of the judgment, and altogether it cannot be regarded as an authority.

We will proceed to state the more modern cases:—

The *Philanthropic Society* v. *Kemp* (4 Beav. 581) (Lord Langdale, M.R.).

Testatrix gave private legacies amounting to £4000 and charitable legacies amounting to £1300, and directed the charitable legacies to be paid and satisfied out of her ready money and the proceeds of sale of her funded property, personal chattels and effects, and not from the proceeds or by sale of her leasehold or real estates; and she charged her leasehold estates bequeathed to B. and S., in addition to her other personal estate, with and to the payment of her debts, funeral and testamentary expenses, and her private legacies. She left £1200 pure personalty, £5400 impure, of which £2985 arose from her leaseholds, and she owed £1500 debts, and her funeral and testamentary expenses had to be defrayed.

The headnote states that the charitable legacies were held to fail in the proportion of the impure to the pure personalty. But this is not made clear by the judgment. It was evidently held that the two classes of personalty were to be applied rateably in paying the debts and expenses, and that the pure personalty was not exonerated from payment of the private legacies. But it is not shewn how the surplus of the personalty was to be applied in paying the legacies. The case must be considered as resting on the special words of the will, and was so treated by Lord Cranworth in *Tempest* v. *Tempest* (7 De G. M. & G. 470). Lord Langdale's meaning is made a little clearer by his own remarks in *Sturge* v. *Dimsdale* (6 Beav. 462) (June, 1843). There a testatrix gave charitable legacies with a direction that they should be paid out of her pure personalty. She also directed certain consols to be kept to answer certain annuities, and afterwards to be applied in paying the charitable legacies.

Lord Langdale gave effect to the latter direction. On the first direction he said, "I do not feel disposed to alter the opinion which I am reported to have expressed on a former occasion. The words here do not contain any direction that the charities shall have any priority over any other demands upon the general assets."

Robinson v. *Geldard* (3 M. & G. 735) (Feb. 1852, Lord Truro, L.C., reversing V.-C. Knight-Bruce (3 De G. & Sm. 499)).

Testator gave a charitable legacy of £5000, adding, "to be raised and paid out of such of my ready money, goods, and personal effects as I may or can by law charge with the payment of the same." He gave other charitable legacies, to be raised and paid in the same manner, making £30,000 given in charity altogether. He gave private legacies amounting to £36,000 without reference to any particular fund. He left £24,000 in pure personalty and £40,000 in impure personalty.

The debts and funeral and testamentary expenses had been paid rateably out of the two divisions of the personalty.

The Lord Chancellor held that the private legacies must be paid in full out of the remaining impure personalty, and that the whole of the remaining pure personalty must be applied in paying the charitable legacies as far as it would go. His Lordship guarded himself against saying how the assets should be applied if the impure personalty were insufficient for payment of the private legacies. But he used the expression that the charitable legacies were in the nature of demonstrative legacies, with the pure personalty appropriated as the fund for their payment. But we shall find from the case next stated that the use of this expression is inappropriate.

Does not make legacies demonstrative.

Tempest v. *Tempest* (7 De G. M. & G. 470) (March, 1857, Lord Cranworth, L.C., reversing V.-C. Wood) 2 K. & J. 635)).

A testatrix, after certain specific and pecuniary gifts to T., who was also made residuary legatee, and various charitable legacies, added, "And I direct that the charitable bequests bequeathed by this my will shall be paid in precedence of the other pecuniary legacies hereby bequeathed, out of such part of my personal property not specifically bequeathed as is by law applicable for charitable purposes."

The pure personalty was insufficient to pay the charitable legacies in full, and the Vice-Chancellor, relying on the expressions used in *Robinson* v. *Geldard* (3 M. & G. 735), ordered the debts and funeral and testamentary expenses and costs to be paid out of the impure personalty.

The residuary legatee appealed, and the Lord Chancellor held

that the debts and funeral and testamentary expenses and costs must be paid rateably out of the pure and impure personalty. They were so payable by law, in the absence of any special direction by the testator, and the clause as to paying charitable legacies out of the pure personalty was not such a direction. It follows, therefore, that charitable legacies directed to be paid out of pure personalty are not demonstrative legacies.

Nickisson v. *Cockill* (3 De G. J. & Sm. 622) (July, 1863, Lord Westbury).

A testator, in the course of his will, gave one immediate and two future charitable legacies payable out of his personal estate. The Lord Chancellor treated this as equivalent to saying out of his pure personal estate; and inasmuch as there was originally sufficient pure personalty to pay them, he held that it was the duty of the trustees in the first instance to set apart a sufficient amount of pure personal estate to answer them and apply the rest of the personal estate and some funds arising from real estate in paying the debts and other legacies, and directed a further sale of real estate to make up any deficiency.

This decision appears to be inconsistent with the other authorities, for the will directed debts and funeral and testamentary expenses to be paid out of the residuary personalty. It was, however, a very special will, and the judgment professes to pursue marshalling directions made by the testator, though it is difficult to find them.

Beaumont v. *Oliveira* (L. R. 4 Ch. 309) (January, 1869, C. A., varying the decree of V.-C. Stuart (L. R. 6 Eq. 534)). Testator gave some private legacies and also charitable legacies amounting to £20,000, and added, "I direct all the said charitable legacies to be paid out of my pure personal estate." He gave the residue of his real and personal estate to his executors for their own use. He left £6711 in pure personalty, leaseholds worth £8045, and land in Madeira which sold for £866. It was found that land in Madeira might be left in charity:

Held, that the general costs, funeral and testamentary expenses and debts should be paid rateably out of the whole estate, and

the charitable legacies were then payable out of the pure personalty in preference to other legacies, and the other legacies out of the impure personalty, and that all the legacies so far as they should not be paid as aforesaid ought to participate in the proceeds of the Madeira property, but that in such participation the charitable legacies, so far as they were unpaid, ought to abate in the proportion which the impure personalty bore to the proceeds of the Madeira estate. The costs of the appeal of all parties with one exception were allowed among general costs.

Llewellyn v. *Rose* (W. N. 1869, 178; 17 W. R. 984) (June, 1869, V.-C. Malins).

Testatrix directed her debts and funeral and testamentary expenses to be paid and made some specific bequests, and gave the rest of her estate to trustees to convert and pay private legacies amounting to £1200 and a legacy of £200 to the L. Infirmary, and gave the residue to three charities, and directed that the several charitable bequests given by her will should be paid out of such parts of her personal estate only by law applicable to bequests of that nature.

She left £890 impure and £3159 pure personalty.

The Vice-Chancellor held that the debts and funeral and testamentary expenses must be paid rateably out of the pure and impure personalty, that the legacy of £200 must be paid out of the pure, and the other legacies rateably out of pure and impure; that the costs must be paid in like manner, and so much of the residue as represented pure personalty would go to the charities, and so much as represented impure to the next of kin.

Wigg v. *Nicholl* (L. R. 14 Eq. 92) (May, 1872, Romilly, M.R.). A testator directed his trustees as follows: "Pay and apply all the rest residue and remainder of my personal estate and effects which may be legally applied for such purposes unto and equally between the six next hereinafter named hospitals, that is to say, (1) St. George's Hospital, Grosvenor Place, Hyde Park, (2) Westminster Hospital, Broadway, Westminster." These two hospitals had power to take land (see the chapter on Special Exemptions from the Georgian Mortmain Act). But the testator named four

others which had no power to take land or impure personalty. He added, "I direct my said estate and effects shall be so marshalled and administered as to give the fullest possible effect to the pecuniary and residuary legacies and bequests hereinbefore contained in favour of the said several hereinbefore named hospitals and other charitable institutions." Fuller marshalling clauses.

It was held that the Court would first ascertain what one-sixth of the remainder of the pure and impure personalty amounted to, and give such one-sixth to the Westminster Hospital and one-sixth to St. George's, applying the impure first to satisfy these two-sixths, and then divide the remaining pure personalty among the other four.

Wills v. *Bourne* (L. R. 16 Eq. 487) (Aug. 1873, Lord Selborne, for M.R.). Testator bequeathed an annuity and some specific and pecuniary legacies free of duty, and devised his real estate to trustees to sell, and out of the proceeds pay the costs of sale and his debts, and funeral and testamentary expenses, and the annuity and legacies thereinbefore bequeathed and the duties thereon, and he gave to the same trustees his personal estate not specifically bequeathed on trust, to convert it into money, and pay so much of his debts, expenses, and legacies as the proceeds of sale of his real estate would not pay, and to stand possessed of the residue for certain charities. And he declared that only such part or parts of his estate should be comprised in the residue as might by law be given for charitable purposes:

Held, that the exclusion of impure personalty from the residue was a direction that it should be applied for those purposes which were to be satisfied before a residue was arrived at.

Miles v. *Harrison* (L. R. 9 Ch. 316) (March, 1874, C. A.). Testator gave some pecuniary and specific legacies, and then gave a certain leasehold estate, and the residue of his personal estate to trustees on trust to convert it and pay his funeral and testamentary expenses, and debts and legacies, and to invest the remainder and pay the income to his wife during widowhood, and afterwards lay out £9721 in purchasing certain Government annuities, and he then gave to the Westmoreland Society School

£100, and two private legacies, and gave the residue in equal thirds to three charities, and added: "And I expressly direct that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose."

He left £46,000 impure and £14,000 pure personalty.

Vice-Chancellor Wickens, on June 7, 1873, thought that the words in the will were insufficient to countervail the general rule of law as to the application of assets (W. N. 1873, p. 137), but Lord Cairns and Lords Justices James and Mellish all took an opposite view, and directed the assets to be marshalled, so as to leave the pure personalty intact for the three last-named charities. The charitable legacy of £100 caused some difficulty. They ordered it to abate in the proportion which the impure personalty bore to the pure, and the part left unabated to be paid out of the pure. They also considered that the estate could not have been administered without the direction of the Court, and directed the costs of the suit in the Court below and the costs of the executors of the appeal to be paid out of the impure personalty. This left the charities, the widow, and two sets of next of kin, who appeared separately, to bear their own costs of the appeal.

Costs.

Shepheard v. *Beetham* (6 Ch. D. 597) (July, 1877, V.-C. Malins). Testatrix gave to the Brompton Hospital her household furniture, pictures, goods, chattels, trinkets, jewellery, and effects, which might be in her dwelling-house at the time of her death, and her ready money, money at her bankers, and money in the public funds, and all other her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, and made no other disposition. She left some impure personalty and realty, as well as pure personalty:

Held, that the gift to the hospital was specific, and that the debts, costs, and funeral and testamentary expenses, other than probate duty, should first be paid out of the impure personalty,

Specific gift.

and in case of deficiency out of the realty, and the probate duty should be paid primarily out of any surplus of the impure personalty, and secondarily out of the pure personalty. Probate duty.

NOTE.—It is probable that the expression "probate duty" was here used to include all the expenses of probate, as the heir-at-law stands in the same position with respect to all of them.

In re Fitzgerald, Adolph v. *Dolman* (26 W. R. 53) (Nov. 1877, Jessel, M.R.). A testatrix gave charitable and other gifts, and added: "I declare my will to be that the legacies and bequests which I have made, which may savour of charitable gifts, shall if necessary, be paid and discharged out of such part of my personal estate as may be lawfully applied for the purpose, in which event my real estate, if any, shall be first charged with and be liable to the payment of my debts and legacies not savouring of charitable gifts."

The testatrix left leaseholds and pure personal estate:

Held, that the leaseholds must be primarily applied in paying debts and legacies, but that the costs were to be borne rateably by the pure and impure personalty, that being the general rule.

Lewis v. *Boetefeur* (W. N. 1878, 21) (Jan. 1878, V.-C. Bacon, affirmed on appeal (W. N. 1879, 11) (Jan. 1879, C. A.)). Testator gave £1000 to his wife, and then £9000 out of his pure personalty on trust for his wife for life and then for charities. He gave the residue of his estate to trustees to convert, and after satisfying the legacy of £9000 out of his pure personalty, and paying out of such part as should not be wanted for that legacy, his debts, and funeral and testamentary expenses, to pay the income to his wife for life, and after her death to raise and pay certain private legacies to the plaintiffs and others amounting to £1000, and charitable legacies to the amount of £40,000, which he directed to be paid out of his pure personalty preferably to any other payment except the £9000 and some of the legacies to the plaintiffs; and as to the ultimate residue of his estate, he gave one-tenth to A. and another tenth to B., and the remaining eight-tenths to the Royal National Lifeboat Institution; and he

declared that in the division of the ultimate residue, the same should, if and so far as necessary, be marshalled, so that the two equal tenths should be paid out of such part thereof as could not lawfully be appropriated for charitable purposes, to the intent that the remaining eight equal parts might consist of such personal estate as might be lawfully appropriated for such purpose.

The testator left £2000 of impure personalty, and the question argued was whether this sum was chargeable in exoneration of the pure personalty with the whole, or rateably with the pure personalty with its proportion of the debts, costs of administration, and the legacies to the plaintiffs.

The latter was held to be the case.

Apparently the estate was insufficient to pay the legacies in full: see 38 L. T. 93.

In re Pitt's Estate, *Lacy* v. *Stone* (33 W. R. 653) (March, 1885, Chitty, J.). Testator gave the residue of his estate in equal shares to St. Thomas's Hospital and the Charing Cross Hospital, which had not power to take land or impure personalty, and St. George's Hospital and Westminster Hospital, which had such power; and declared that his pure personal estate should in the first place be applied in paying the shares of St. Thomas's and Charing Cross Hospitals. The residue consisted of about £2000 pure and £5000 impure personalty.

The will was held to direct the debts, and funeral and testamentary expenses, to be paid first out of the impure personalty.

Kilford v. *Blaney* (29 Ch. D. 145) (March, 1885, V.-C. Bacon; varied on appeal (31 Ch. D. 56) (Nov. 1885, C. A.)).

Testatrix devised real estate to pay her funeral and testamentary expenses, debts, legacies, and duties, and gave leaseholds to make up any deficiency, and gave her other personal estate in charity. The other personal estate included a mortgage, and she left no next of kin.

It was held that the debts, &c., should be apportioned over the pure and impure personal estate, including the leaseholds, and that first the real estate, and secondly the surplus of the

leaseholds, should be applied in exonerating the pure personalty ; and that the Crown took the impure, *minus* its proportion of debts, &c.

The most recent case upon this subject is *In re Arnold, Ravenscroft* v. *Workman* (37 Ch. D. 637) (Feb. 1888, Kay, J.). There testatrix gave her estate to trustees to convert, and out of the proceeds pay her debts, funeral and testamentary expenses, and the legacies thereby bequeathed. She then gave private legacies amounting to £1370, and added : " I direct that all the above legacies shall . . . in the first instance be chargeable upon and payable out of the proceeds of sale of my real and leasehold estate, if any." She gave the residue of her estate in charity in certain shares, and added : " I direct that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable for that purpose."

She left land at Capetown worth £1237, no other real or leasehold estate, but £4950 impure, and £1175 pure personalty.

Kay, J., held that, on the words of the will, the private legacies must be paid first out of the property at Capetown, as far as it would extend, and the rest of the legacies, and the debts, funeral and testamentary expenses, and costs of the action, out of the impure personalty, leaving the pure personalty as far as possible to constitute the ultimate residue.

It will be seen that the tendency of the decisions has been more and more favourable to charitable gifts, but the cases are not altogether in harmony, and it is desirable that every will containing charitable dispositions should state explicitly the testator's wishes as to the mode of application of his assets. The cases which have been decided shew the doubts which may be raised, and every careful conveyancer should guard against them.

CHAPTER XXXVII.

On Costs.

General rule.

In general, when a difficulty arises in the administration of a testator's estate, the costs of solving the difficulty are paid out of the residue of the estate.

But if no difficulty arises in the first instance, but after a trust legacy has been severed from the estate a difficulty arises in the administration of that legacy, the costs fall upon it. But the practice of the Court varies in the application of these rules to charitable cases.

How applied in cases of charities.

In *In re Birkett* (9 Ch. D. 576) (July, 1878) a will contained a doubtful charitable legacy of £500, and the executors paid it into Court. Jessel, M.R., on a petition by the administrator of the charity, awarded the whole fund to the charity, and allowed the petitioner's costs out of the fund. The executor was trustee of the residue for an infant, and both executor and infant were represented by the same counsel, but Jessel, M.R., refused to give them any costs out of the fund. He said the executor could take his costs out of the residue, and could not, by paying a legacy into Court, relieve the residue from its proper burden.

Doubtful legacy should not be paid into Court.

However, in *Biscoe* v. *Jackson* (35 Ch. D. 466) (Nov. 1886) Kay, J., decided to apply a legacy of £10,000 *cy-près*, but he allowed the next of kin their costs of opposing it out of the fund as between party and party, and paid the costs of the Attorney-General and the trustees out of the fund as between solicitor and client.

The question of costs is not mentioned in the report of the appeal on which the judgment was affirmed. In this case there was no residuary gift in the will, so that the next of kin were practically residuary legatees.

Sometimes the costs of the Attorney-General are thrown on the charitable legacy, and the costs of other parties on the residue of the estate (*A.-G.* v. *Vint* (1850) (3 De G. & Sm. 704)).

Old rule.

There was formerly a rule that an heir-at-law or next of kin, appearing and unsuccessfully disputing the validity of a charitable disposition, was allowed costs as between solicitor and client out of the fund, at least if no improper point was raised on their behalf. See the cases cited in *Whicker* v. *Hume* (14 Beav. 528) (April, 1851), and see

Moggridge v. *Thackwell* (7 Ves. 36) (1802); *Gaffney* v. *Hevey* (1 Dr. & Walsh, 25) (1837, Ireland); *Carter* v. *Green* (3 K. & J. 591) (1857).

In *Currie* v. *Pye* (7 Ves. 462) (April, 1811, Lord Eldon) a testator charged his realty with payment of his legacies. Some were charitable legacies, but the estate was insufficient to pay the other legacies, and it was held that the failure of the charge of the charitable legacies inured for the benefit of the others, and did not let in the heir. But the heir was allowed his costs as between solicitor and client, on the ground that it was a charity case.

Party and party costs now allowed.

But this rule is now overruled, and only party and party costs are allowed.

Whicker v. *Hume* (14 Beav. 528) (April, 1851), as to an heir-at-law; *Wilkinson* v. *Barber* (L. R. 14 Eq. 96) (June, 1872), as to next of kin; *Biscoe* v. *Jackson* (35 Ch. D. 466) (Nov. 1886, Kay, J.), stated above.

In *Jervis* v. *Lawrence* (22 Ch. D. 202) (Nov. 1882, V.-C. Bacon) the next of kin opposed a petition asking for payment of certain bonds to charitable legatees, on the ground that such bonds were impure personalty. The opposition failed, but the costs of the next of kin were allowed out of the fund.

But in *Spiller* v. *Maude* (32 Ch. D. 158, n.) (July, 1881,

Jessel, M.R.), the costs of an unsuccessful opponent were allowed out of a charity fund, as between solicitor and client. But the opponent in that case appears to have been a necessary party to the application, and the costs do not appear to have been increased by the unsuccessful argument.

Also in *Mitchell* v. *Moberley* (6 Ch. D. 655) (July, 1877, V.-C. Bacon) the same was done. There a residue was given in charity, and the next of kin took out a summons claiming a railway debenture mortgage as impure personalty. The summons was adjourned into Court and decided against them, but the Vice-Chancellor said: "The costs of raising the question in chambers and of the adjournment into Court will be paid out of the fund as between solicitor and client, there being a conflict of decision on the point."

Costs of appeal.

This allowance of costs to parties contesting a charitable gift only extends to costs in the Court of first instance. If a party is not satisfied with the first decision and appeals against it unsuccessfully, he is in general ordered to pay the respondent's costs of the appeal (*Obert* v. *Barrow* (35 Ch. D. 488) (May, 1887, C. A.)).

But if the point of law is a new one, or there are conflicting decisions below, or the Judge below suggests an appeal, the costs of the appeal may be allowed out of the fund. This was done in *Whicker* v. *Hume* (1 De G. M. & G. 506) (March, 1852, in the C. A.). But on a further appeal being taken to the House of Lords and failing, the appellant was ordered to pay the costs of such further appeal (*Whicker* v. *Hume* (7 H. L. C. 167) (July, 1858)).

Also in *Dolan* v. *Macdermott* (L. R. 5 Eq. 60, & 3 Ch. 676) (June, 1868) the next of kin were allowed their costs of appealing out of the estate, which was all pure personalty given to charities, though the appeal was unsuccessful and they had been allowed their costs below in like manner.

Conversely a charity may be allowed not only the costs of an unsuccessful claim in the Court below, but also the costs of an unsuccessful appeal (see *Ashworth* v. *Munn* (15 Ch. D. 363)

(July, 1880), where the question was whether land included in partnership assets was pure or impure personalty—a point not previously decided).

Costs of charity allowed.

It is a matter of course to allow a charity the costs of appearing in the Court of first instance in support of a gift in a will, although the decision may be against them: *In re Lynall's Trusts* (12 Ch. D. 211) (July, 1879); *Giblett* v. *Hobson* (1834, 3 M. & K. 517).

Out of what fund costs are paid.

We have seen in the chapter on Marshalling Assets, that the general costs of an administration action are paid rateably out of pure and impure personalty, when no special direction on the subject is given by the testator (*Tempest* v. *Tempest* (7 De G. M. & G. 470) (March, 1857); *Beaumont* v. *Oliveira* (L. R. 4 Ch. 309) (Jan. 1869); *Adolph* v. *Dolman* (1877) (26 W. R. 53); see also *Johnson* v. *Woods* (2 Beav. 415) (Feb. 1840)); but that when any special direction is given appropriating some property to payment of testamentary expenses, the general costs of administration are included in that term (*Ravenscroft* v. *Workman* (37 Ch. D. 637); *Shepheard* v. *Beetham* (6 Ch. D. 597); *Hopkinson* v. *Ellis* (1846) (16 L. J. N. S. 59)).

The attention of the Court was called to this point in *Miles* v. *Harrison* (L. R. 9 Ch. 323), and Lord Cairns there expressed an opinion that where an estate could not have been administered without recourse to the Courts, the proper costs of such administration were to be included amongst the testamentary expenses; and he allowed, in that case, some of the costs of the appeal as proper costs of the administration. The Court, of course, has jurisdiction to order any parties to pay or bear any costs which are improperly incurred.

But this rule did not always prevail. We find a case of *Taylor* v. *Mogg* (27 L. J. N. S. Ch. 816) (July, 1858, V.-C. Stuart), where a different order was made.

A testator gave a legacy and bequeathed all his personal estate to his executors to get in and pay his debts, and funeral and testamentary expenses, and the legacy, and then pay so much as they could by law dispose of for charitable purposes to

the Lincoln Penitent Female Home. He made no further disposition:

Held, that the impure personalty, being undisposed of, ought to bear the costs of the suit.

This decision was apparently based on *Howse* v. *Chapman* (4 Ves. 542), as that case was cited in it. But it would appear to be more consistent with principle to hold that the costs were included in the testamentary expenses, and payable rateably out of the pure and impure personalty. And this case would probably be considered as overruled by *Miles* v. *Harrison* (L. R. 9 Ch. 323).

Lapsed share not applied first.

A decision was once given to the effect that a share of residue, which lapsed, would be first applied in paying costs (*Gowan* v. *Broughton* (L. R. 19 Eq. 77)); but this has been overruled (*Blann* v. *Bell* (7 Ch. D. 382) (Nov. 1877, V.-C. Hall)). The costs therefore, in default of express direction, come primarily out of the general personal estate not specifically bequeathed, pure and impure personalty being applied rateably, as before mentioned.

On the other hand, parties who make an unsuccessful attack on a charitable fund may be ordered to pay costs as between solicitor and client.

Parties may be ordered to pay solicitor and client costs.

This was done by Kay, J., in *Andrews* v. *Barnes* (W. N. 1887, 251) (Dec. 19, 1887). The fund in that case was a small one, and the order was made on the precedents afforded by three earlier cases. Such cases were:—

(1) *Edenborough* v. *Archbishop of Canterbury* (2 Russ. 93) (July, 1826, Lord Eldon). The parishioners of S. had the right of electing their vicar, and the result of an election being disputed, two suits were brought, where the rival claimants, and the Bishop, the Archbishop, and the Attorney-General were parties. As these officials were in the position of trustees, and were in no way to blame, and the plaintiffs in the two suits were the beneficiaries, and there was no trust fund, the plaintiffs were ordered to pay their costs as between solicitor and client.

(2) *A.-G.* v. *Cuming* (2 Y. & C. Ch. 139) (Feb. 1843, V.-C. Knight). This was a suit by information and bill to compel the

bishop to institute a parson elected by parishioners. No costs were allowed to the bishop, because he contested the validity of the election. But certain trustees of the advowson, who had done nothing improper, were necessary parties to the suit, and they were held entitled to have their costs as between solicitor and client from their beneficiaries, that is to say, from the plaintiffs.

(3) *Turner* v. *Collins* (L. R. 12 Eq. 438) (July, 1871, V.-C. Malins). This was not a charitable case, but an unsuccessful suit to rectify a settlement. The Vice-Chancellor held that he could only order the plaintiff to pay party and party costs to the beneficiaries, who were made defendants; but he ordered him to pay costs as between solicitor and client to the trustees. This is certainly inconsistent with the general practice of the Court, which usually orders a defeated opponent to pay party and party costs to trustees, and gives them any extra costs out of the trust estate.

The plaintiffs appealed against Mr. Justice Kay's order in *Andrews* v. *Barnes*, so far as it gave costs as between solicitor and client. But the Court of Appeal held that, as the Court of Chancery had jurisdiction to award such costs before the Judicature Act, the High Court had such power in any case which might formerly have been brought in the Court of Chancery; and they dismissed the appeal (*Andrews* v. *Barnes*, June, 1888, 39 Ch. D. 133, full argument and careful judgment).

Party alleging secret trust ordered to pay costs.

An action by an heir-at-law or next of kin, or residuary devisee or legatee, claiming property on the ground that a devisee or legatee undertook a secret trust to apply it for an illegal purpose, stands on a different footing from the argument of the validity of a charitable gift arising in the course of an administration. In such cases, if the plaintiff fails to prove his claim, he is usually ordered to pay the defendant's costs.

Paine v. *Hall* (18 Ves. 475) (Feb. 1812); *Lomax* v. *Ripley* (3 Sm. & Giff. 48) (Feb. 1855); *Wallgrave* v. *Tebbs* (2 K. & J. 313) (Dec. 1855); *O'Brien* v. *Tyssen* (28 Ch. D. 372) (Dec. 1884).

But not always.

But where the testator has sailed very near the wind in the way of imposing an illegal trust on the devisees, the plaintiff will not be ordered to pay costs (*Rowbotham* v. *Dunnett* (8 Ch. D. 430); *Jones* v. *Badley* (L. R. 3 Ch. 362); or if the Court considers the case a hard one (*Addlington* v. *Cann* (3 Atk. 141)).

But defendant's costs allowed.

In *Springett* v. *Jennings* (L. R. 10 Eq. 488) (June, 1870), where the heirs recovered land devised upon a secret trust, the costs of all parties were allowed out of the estate.

In *Jones* v. *Badley* (L. R. 3 Eq. 635) (Jan. 1867), Romilly, M.R., held that a secret trust was established, and that the defendants were trustees of the residuary realty and impure personalty for the testator's heir-at-law and next of kin; but he remarked that the defendants were trustees, and had done no more than their duty in endeavouring to carry into effect the wishes and intentions of the testatrix. He therefore allowed them their costs as between solicitor and client. This decree was, however, reversed on the merits (L. R. 3 Ch. 362) (April, 1868) by Lord Cairns, who concluded his judgment by saying, "I assume that in such a case no costs will be asked for."

Before leaving the subject of costs we may mention that the 17th section of the Judicature Act, 1875, gives power to issue rules for regulating, amongst other things, the costs of proceedings in the Supreme Court.

Order LXV. of the existing rules, issued under this authority, deals with the subject of costs, and three of its clauses deserve to be here set out. These are—

Costs in discretion of Court.

"(1.) Subject to the provisions of the Acts (*i.e.* the Judicature Acts) and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted, or carried on, or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: (with a further proviso as to jury cases).

Except trustees and the like.

"24. The fees payable on proceedings before a judge in chambers under the Charitable Trusts Act, 1853, s. 28, shall be the same as the fees payable according to the rules relating to costs in respect of other proceedings commencing by summons, and shall also in other respects be regulated by these rules. Costs under Charitable Trusts Acts.

"25. Where the judge directs that any matter commenced by summons under the Act in the last preceding rule mentioned shall be heard in open Court, the same fees shall be payable, and the same costs shall be allowed, as would have been payable in respect of any other matter so heard."

CHAPTER XXXVIII.

On some Miscellaneous Points.

We purpose in this chapter mentioning a few points which deserve attention, and have either not been mentioned in any other chapter, or have only been mentioned incidentally so as to be liable to escape observation.

Confused Gifts.

Cases sometimes occur in which a good gift of property for a charity is mixed up with a void gift of other property. In such a case, if the property validly given is severable from the other property, the gift of it is good.

The following are instances of this principle:—

Waite v. *Webb* (6 Mad. 71) (May, 1821, V.-C. Leach). Testator directed a freehold estate to be sold, and the produce applied, together with so much of the personal estate as should be necessary, to secure an annuity of £30 a year for the life of A., and after the death of A. the principal to go to a charity. The estate sold for £250. Apparently the personalty was all pure, and it was conceded that the clause in the will amounted to a direction to invest a sufficient sum in the funds to produce £30 per annum.

The Vice-Chancellor held the charitable bequest void as to the £250, but good as to the rest of the sum required from the personal estate to secure the annuity.

Ford v. *Fowler* (3 Beav. 146) (Aug. 1840) may be found in the chapter on the Effect of Failure. It will be seen that a good trust declared of a definite sum was held to be unaffected by the fact that the same trust was expressed of an indefinite contemplated addition to it (*ante*, pp. 469, 470).

Severable Gifts to Individuals mixed with Void Gifts.

Another class of cases which bear some resemblance to the last includes that in which an intended permanent charitable trust is accompanied with a designation of the persons who are to be the first objects of its benefits. In some of such cases the Court has held that a valid private trust for the first takers, or a valid life estate, could be severed from the rest of the gift; but in other cases it has held the whole void.

The following cases, which will be found in one category in the chapter on the Effect of Failure, may be consulted on this point:—*Willet* v. *Sandford* (1748) (1 Ves. Sen. 178, 186); *Doe* d. *Toone* v. *Copestake* (1805) (6 East, 328); *Doe* d. *Thompson* v. *Pitcher* (1815) (6 Taunt. 359); *Doe* d. *Burdett* v. *Wrighte* (1819) (2 B. & Ald. 710); *Doe* d. *Chigley* v. *Harris* (1847) (16 M. & W. 517); *Young* v. *Grove* (1847) (4 C. B. 668); *Wright* v. *Wilkin* (1860) (7 Jur. N. S. 441) (*ante*, pp. 465–467).

Two cases will also be found in the chapter on Poor Relations, namely, *Blandford* v. *Thackerell* (1793) (2 Ves. Jun. 238) and *Lilcy* v. *Hay* (1842) (1 Hare, 580) (*ante*, pp. 158, 163).

To these may be added *Dillon* v. *Reilly* (1875) (I. R. 10 Eq. 152) in the chapter on Superstition, and *Carbery* v. *Cox* (1852) (3 Ir. Ch. 231) in the chapter on Religious Orders (pp. 57, 62).

And the following cases in the chapter on Ministers: *Doe* d. *Phillips* v. *Aldridge* (1791) (4 T. R. 264); *Grieves* v. *Case* (1792) (1 Ves. Jun. 548); *Thornber* v. *Wilson* (1855) (3 Drew. 245); *Robb* v. *Dorrian* (1875) (I. R. 9 C. L. 483), and *Gibson* v. *Representative Church Body* (1881) (L. R. Ir. ix. 1) (pp. 135–139).

Precatory Trusts.

In respect of precatory trusts charitable dispositions are subject to the same rules as private dispositions; that is to say, if a testator uses precatory words, suggesting that something should be done, and his words define with certainty the property to be effected and the objects to which he wishes it to be applied, a

precatory trust is raised. And the word charity alone is a sufficient indication of objects.

The cases of *Doe* d. *Burdett* v. *Wrighte* (1819) (2 B. & Ald. 710) and *Pilkington* v. *Boughey* (1841) (12 Sim. 14), which will be found in the chapter on Effect of Failure, are instances of this rule (*ante*, pp. 466, 467).

A trust to invest in land may also be raised by precatory words, as will be seen in *Kirkbank* v. *Hudson* (1819) (7 Price, 212) and *Martin* v. *Wellsted* (1854) (2 W. R. 657), both stated in the chapter on Mortizing (*ante*, p. 325).

Gifts upon Condition.

A trust may be raised by a gift upon condition of doing a certain thing, even when followed by a gift over if the condition be broken. Ordinarily under a conditional gift the first donee has an option of fulfilling the condition and keeping the property, or omitting to fulfil the condition, in which case the gift over takes effect, or, if there is no gift over, the property may be recovered by the donor or his representatives. In such a case the person to be benefited by fulfilment of the condition has no right to sue. But if the gift be construed as a gift upon trust, the result is totally different. The donee has no option in the matter, but can be compelled to perform the trust by the person or persons to be benefited by it. In the case of a trust for a charity, the suit might be maintained by any trustees of the charity, or, in default of such trustees, by the Attorney-General.

The authorities upon this subject are not all uniform. The tendency in early times was to treat such a limitation as a conditional gift, and the tendency in modern times is to treat it as a trust.

In *Porter's Case* (1592) (1 Co. Rep. 16) such a limitation was treated as a conditional gift, as will be seen in the chapter on Schools (*ante*, p. 167).

In *A.-G.* v. *Christ's Hospital* (1 Bro. C. C. 165) (M. T. 1790) an estate had been devised to Christ's Hospital on condition of their maintaining six children from the parish of S. The

hospital took possession, but had only maintained three children as the rents had not been sufficient to pay for six. The rents had increased, however, and the Lord Chancellor said that whether the rents were or were not sufficient, the hospital having taken possession of the estate was bound to perform the condition, and that they should have considered that previous to taking possession.

In the case of *A.-G.* v. *Andrew* (1798) (3 Ves. 633), stated in the chapter on *Cy-près* (p. 454), an instance will be found of a college at Cambridge disclaiming a devise on trust, conceiving that the acceptance of the devise would involve the obligation to fulfil the trust, and that that would be prejudicial to the college.

In *A.-G.* v. *Christ's Hospital* (1 R. & M. 626) (June, 1830, Leach, M.R.) there was a gift by will of £400 a year to Christ's Hospital, provided that Guy's Hospital should have liberty to nominate four poor children to it every year, and a clause saying that if the governors of Christ's Hospital should neglect to take in the children nominated it should be lawful for Guy's Hospital to apply the £400 in the education and maintenance of such children elsewhere. From 1725 to nearly 1830 Christ's Hospital received the money and took the children, but they then declined to do so any longer, saying that the money was insufficient to pay for the children.

It was held that the annuity was a perpetual one, and that having once accepted it they were bound to fulfil the condition; and that the last clause gave only a collateral remedy to secure the testator's intention, and did not confer on Christ's Hospital any right to abandon the annuity and the duties involved in taking it.

Re Coningtón's Will (1860) (8 W. R. 444), stated in the chapter on Remoteness, may be mentioned as a case of a gift with a condition annexed, and a gift over, where the Court managed to dispense with the condition (*ante*, p. 429).

In *Wright* v. *Wilkin* (7 Jur. N. S. 441) (Nov. 1860, Q. B.) a devise on condition of paying certain charitable and other legacies was held to be a devise on trust, so that the non-payment of the

charitable legacies, which necessarily took place, did not avoid the devise.

The cases of *Merchant Taylors' Co.* v. *A.-G.* (1871) (L. R. 6 Ch. 512) and *A.-G.* v. *Waxchandlers' Co.* (1873) (L. R. 6 H. L. 1), stated in the chapter on Charge or Trust, should next be mentioned. In each there was a devise on condition of the devisee carrying out certain charitable gifts and a gift over in default, but the limitation was held to create a trust. Lord Cairns said (L. R. 6 H. L. 21): "If I give an estate to A. upon condition that he shall apply the rents for the benefit of B., that is a gift in trust to all intents and purposes." And this principle was approved by Lord Selborne in *Goodman* v. *Mayor of Saltash* (1882) (7 App. Cas. 642), where he added more to the same effect (*ante*, pp. 285, 287, and 220).

Again, in *Shuldham* v. *Royal National Lifeboat Institution* (35 W. R. 710) (May, 1887, Chitty, J.) a bequest to the institution on condition of their building and maintaining certain lifeboats, with a gift over on non-compliance, was held to be a gift on trust, and the money was ordered to be paid to the institution, on their accepting it as a gift in trust.

In connection with this subject we may mention the case of *Christ's Hospital* v. *Grainger* (1849) (1 M. & G. 460), where property was limited to a corporation on charitable trusts, with a proviso that if they failed to perform the trusts, it should go to another corporation upon other trusts; and default having been made, the gift over was held to operate. The beneficiaries under the first trusts were thus ousted by the default of their trustees (*ante*, p. 428).

Gifts subject to a condition which makes them legal.

A gift which cannot take effect as things stand at the time of the gift, but which is expressed to be conditional on something else being done, the performance of which will make the gift lawful and valid, is a perfectly good form of gift. Instances of this will be found in the chapter on Mortizing, under the clauses dealing with gifts which are conditional on land being

lawfully provided by some one else. The doctrine is also laid down in the Canadian case of *Abbott* v. *Fraser* (1874) (L. R. 6 P. C. 96), and is illustrated by *Baldwin* v. *Baldwin*, No. 2 (1856) (22 Beav. 419), stated in the chapter on General Exemptions from the Georgian Mortmain Act (*ante*, pp. 378, 379).

Trusts for Accumulation.

If a testator directs money to be accumulated for a lawful period, and to be handed over with the accumulations at the end of the period to a charitable society, the Court will not stop the accumulations and hand it over at once, since the effect of that would be to benefit a different set of objects from those intended by the testator: *Harbin* v. *Masterman* (L. R. 12 Eq. 559) (July, 1871, V.-C. Wickens).

But in *Martin* v. *Maryhan* (1844) (14 Sim. 230), where a testator directed an indefinite accumulation, which would have exceeded the legal limit, and eventually devoted the whole to charitable purposes, the Court applied the whole to charitable purposes at once, directing a scheme to be drawn up, paying regard to the purposes specified by the testator.

Legacy Duty.

The legacy duty upon a charitable legacy cannot be paid out of realty or impure personalty: *Wilkinson* v. *Barber* (1872) (L. R. 14 Eq. 96). The duty is at ten per cent.

Reparations, Ornaments, and Necessary Occasions.

We may add here, that while this work has been passing through the press, the case of *In re Palatine Estate Charity* (stated *ante*, p. 91) has been reported in full (39 Ch. D. 60). The judgment lays down that reparations of charity buildings include the erection of new buildings, that ornaments of a church bear a wide meaning, and that the trust in that case included repairs of the bells, but not payments to any bell-ringer. The word *steeple*, not *spire*, was used to include the bell-chamber.

CHAPTER XXXIX.

On Procedure.

Actions at law.

In giving an account of the history of the procedure in charity cases, it will be well to fix our thoughts by considering the principal cases in which litigation arises respecting the property of charities. One case is when a supposed injury is done to the property for which an action at law would lie, if the property were the private property of the trustees of the charity. A tenant may neglect to pay his rent, or a stranger may claim a right of way across the estate of the charity. In such cases the trustees of the charity could and can bring an action at law, just as if the property were their own. We shall see hereafter that these cases are unaffected by the Charitable Trusts Acts of the present day.

Suits against strangers.

In like manner trustees of charities were allowed to sue strangers in equity, where a suit would have been sustainable if the trust property had been their own. (See *Emmanuel College* v. *Evans* (1 Rep. Ch. 12) (1625).)

Questions arising in administrations.

A second case is when a testator has made a charitable disposition by his will, and questions are raised as to its validity, or the proper means of carrying it out. In such cases the question could be raised in an ordinary suit to administer his estate. We find accordingly very early instances of the administration of charitable bequests by the Court of Chancery, under its general jurisdiction to administer the estates of testators. And in like manner charitable trusts were occasionally administered in other suits which came before the Court under other branches of its jurisdiction. Some early instances of the enforcement of charitable trusts in this manner may be found mentioned in Spence, Eq. Jur. i. p. 588; and a decree in such a case, in 1585,

may be found set out in Acta Cancellariæ, p. 559, and something analogous on pp. 307 and 309 of that book. Also in Duke, B. 163, a statement may be found of such a case in the 24th Eliz., 1581–2, which is usually referred to as *Symons' Case*. In the course of time it came to be settled that when the application of a charitable gift arose incidentally in an administrative suit, the Attorney-General should be brought before the Court to protect the interests of the public, unless the gifts were to the trustees of an established charity (*Martin* v. *Freeman* (W. N., 1888, 32)); and even then his presence might be required to settle a scheme of property given upon special trusts, that is to say, not given so as to form part of the general funds of the charity (*Wellbeloved* v. *Jones* (1 Si. & Stu. 43) (1822)).

When necessary to serve Attorney-General.

A third case is when the trustees of charitable property have improperly sold it, or let it at an undervalue, to some person having a knowledge of the trust. Here the title of the purchaser would be good at law, but bad in equity; but our legal ancestors appear to have taken some time to decide who could sue him.

Improper sale or lease.

A fourth case is when the trustees of a charity apply its money to wrong objects, or appropriate it to their own use. In this case it must always have been clear that they committed a breach of trust, but a difficulty appears to have been felt as to who was the proper person to sue them for it.

Breach of trust.

At length, some ten years after the Restoration, it came to be established that the Attorney-General, as representing the Crown, was the proper person to sue in the two last-mentioned cases. This resulted from the theory of our law that the King or Queen is *parens patriæ*, and has therefore the right to sue to enforce the fulfilment of all public duties. Of course the suit had to be brought in the Court of Chancery, because that was the Court which enforced the performance of all trusts. The Attorney-General came before it, however, not in the light of a suitor complaining of an injury done to himself, but as one officer of the Crown calling the attention of another officer to

Crown could sue by Attorney-General.

some neglect on the defendant's part in the performance of a public duty. Hence his pleading was not called a bill of complaint, but an information.

Informations.

Informations were not restricted to charity cases, but were applicable to all cases in which rights of the Crown were involved. They were known in the Courts of Common Law in very early times, and attained historical notoriety in the reign of Henry VII. in the hands of Empson and Dudley. Numerous Acts of Parliament were passed from time to time to regulate proceedings by informers. In early times, also, a distinction in form was made between cases in which the rights of the Crown were directly interested—such as a claim to property which vested in the Crown as *bona vacantia*—and cases in which the Crown intervened merely for the protection of some of its subjects, as in the matter of charities. In the former cases the Attorney-General acted officially, and personally directed the proceedings. No other person was named as acting with him in the matter, and the suit was called an information *ex officio*. In the latter class of cases the Attorney-General was expressed to sue at the relation of others; the parties who instigated him were termed the relators; and the proceeding was called an information *ex relatione*. One of the grievances committed by the Court of Star Chamber was, that it usurped jurisdiction to treat an injury done by one subject to another as an injury done to the Crown; and entertained informations in matters which fitly formed the subject of actions and suits in the existing Courts; and inflicted fines for the benefit of the King, besides granting relief between the parties.

Ex officio.

E relatione.

In Noy, 103 (12 Jac. I.) (1614), will be found an information in the Star Chamber by the Attorney-General at the relation of one Egerton against Brereton and Townsend, complaining that the defendants had suppressed a will, and thereby disinherited the relator's wife. They were ordered to pay damages to the relator and certain fines to the King. The word "charity" is appended to this case in the Repertorium Juridicum, but on reading the report it will be found to have no connection with

charity. It shows, however, that the form of an information *ex relatione* was established as early as 1614.

Position of relators.

In informations *ex relatione* the Attorney-General only lent his name to a proceeding, which was really a suit by the relators. The relators directed all the proceedings, and were liable to be ordered to pay all the costs. But they were, nevertheless, subject to the control of the Attorney-General if he thought fit to interfere in the matter. They had to procure his signature to the original information and to any amendment of it, and to serve him with notice of any application made by them to compromise the suit, though every such application was necessarily made in his name. The present practice follows the analogy of the old procedure in this respect; and in the case of an action by the Attorney-General *ex relatione*, the original writ must be signed by him; and the Central Office Practice Rules, 1882, provide that if any amendment is made, it must be authorized by his signature on the original writ or draft.

When the practice was first adopted of calling in the aid of the Attorney-General to redress abuses of charities, all the pleaders do not seem to have recognised at once that they were only adopting a known form of pleading to a new set of circumstances. Accordingly, we find the pleading commencing the suit called a bill in many of the reports, and the Attorney-General is expressed to sue on behalf of the King and certain other parties, who are called plaintiffs; and some of the cases are entered in the indexes under the word Rex (*A.-G.* v. *Newport* (Finch, 187) (1674); *A.-G.* v. *Platt* (Finch, 221) (1675); *A.-G.* v. *Mayor, &c. of Rochester* (Finch, 193) (1675); *A.-G.* v. *Peacock* (Finch, 245) (1676); *A.-G.* v. *Hobert* (Finch, 259) (1676); *A-G.* v. *Whitchcott* (Finch, 353) (1678), and *A-G.* v. *Twisden* (Finch, 336) (1678)). In the last-mentioned case the report states that "this bill was in the nature of an information."

First charitable information.

It is probable that the first charitable information was that of *A.-G.* v. *Newman* (1 Ch. Ca. 157), sub nom. *R.* v. *Newman* (1 Lev. 284) (H. T. 1670). It will be seen from the report of the case in 1 Ch. Ca. that a question was raised as to the jurisdiction, and

a declaration made that the King, as *parens patriæ*, may inform for any public benefit for charitable uses before the statute 30 Eliz. The statute 30 Eliz. is doubtless a mistake for the 43 Eliz. c. 4, or the 39 Eliz. c. 6; and the case is an early authority for the proposition that the Court of Chancery had an original jurisdiction to entertain charitable informations, although it may never have been called on to exercise this jurisdiction before the year 1670. In *A.-G.* v. *Newman* the Attorney-General was expressed to sue on behalf of the King and Trinity College, Cambridge; but under date of the same year, we find in Duke, B. 590, a case of *A.-G.* v. *Townsend*, which is described as an information at the relation of the Master and Fellows of Christ's College, Cambridge, and in which a decree was made carrying out a trust for a poor scholar and the poor of certain parishes. A note is appended to this case in the first edition of Duke, published in 1676, that when a devisor gives all the estate or the surplusage of his estate to the poor, then the proper way to have the same applied to charitable uses is by information in Chancery; and this is referred to in the index as if it were the only case in which an information was proper. The writer had probably heard of the decision given in *A.-G.* v. *Matthews* (2 Lev. 167), in which Lord Keeper Finch quashed a decree of commissioners, under the stat. 43 Eliz. c. 4, saying that they had nothing to do with a trust for the poor in general, but that it was to be determined in the Court of Chancery upon information by the Attorney-General, which was brought accordingly, and a decree made. The date of this decision is T. T. 1676, but the quashing of the commissioners' decree must have been some time earlier. Duke also sets out the information in *A.-G.* v. *Townsend* as a precedent, and the only precedent of an information; indeed, it is the only information mentioned in the first edition of his book. It is tolerably clear, therefore, that the principle that the Court had jurisdiction to entertain informations in all charitable cases was not established in 1676. In Hearne on Charitable Uses, published in 1660, informations are not mentioned at all; and in the old book of precedents called "Symbolæography," published in 1632, there is no

mention of any charitable information, or any information in Chancery, but precedents are given of informations in the Star Chamber and the Court of Exchequer. In further support of the view that charitable informations were in fact unknown before 1670, we may refer to the case of *Blackston* v. *Hemsworth Hospital* (Duke, B. 644) (1636), where an information would have been proper, but a circuitous method of procedure was adopted instead. We may also refer to the case in 1570 mentioned in *A.-G.* v. *Master of Brentwood School* (1 M. & K. 376), where a charitable suit was maintained by the inhabitants of a district for which the charity was intended.

In further support of the view that the law was felt to be deficient in the means provided for enforcing the proper fulfilment of charitable trusts, we may adduce the institution of the office of visitor to look after charities, and the frequent occurrence of gifts over in wills to take effect if the charitable trusts were not performed, and the further appointment of auditors of the trustees' accounts, which are frequently found in ancient wills.

In a little time, after the date which we have fixed for the introduction of charitable informations, suits by the Attorney-General in charitable matters became common, and were called informations; he was himself called the informant, and was expressed to sue at the relation of other parties, who were called relators. And the custom prevailed for relators to be named in all charitable informations (Mitford on Pleading, c. 1, s. 1; 1 Ves. Jr. 246, n.), but the Attorney-General had the right to proceed *ex officio* in such cases, and this right was recognised by Lord Eldon in *In re Bedford Charity* (2 Swan. 520) (1819), and by the legislature in the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137, s. 18).

Who may be relators.

In modern times it has been clearly established that any person may act as relator in a charitable information without his having the slightest interest in the proper administration of the charity. (See the remarks of Gifford, M.R., in *A.-G.* v. *Vivian* (1 Russ. 236) (1826).) And a similar rule has been established for other informations. But it was nevertheless

customary for relators to put in a clause showing that they had some interest in the matter. In *Rickards* v. *A.-G.* (12 Cl. & F. 30) (1843) an attempt was made to except to such a clause for impertinence (*i.e.* as being unnecessary or irrelevant), but the exception was overruled. Indeed an opinion appears to have prevailed down to the end of the last century that an interest in the relator was necessary to support a charitable information (2 Atk. 3rd ed. 328, n. (1794)). And when we read the judgment of Lord Hardwicke, in *A.-G.* v. *Bucknall* (2 Atk. 328), it would appear that prior to the date of that decision, namely June, 1741, it had been thought that the relator must be the person most interested in the due application of the property, but Lord Hardwicke there held that any person interested, however remotely, might act as relator. Lord Loughborough, moreover, in *A.-G.* v. *Bowyer* (3 Ves. 726) (1798), mentions a tradition that prior to the time of Lord Ellesmere (1596–1617) there were no such informations as that in which he was sitting; but we have seen above that charitable informations cannot be traced back before 1670, and this tradition appears to confuse informations with commissions under the statute 43 Eliz. c. 4, which was passed in the time of Lord Ellesmere. It is clear, however, that other cases have proceeded on the principle that informations in charity cases were within the jurisdiction of the Court of Chancery before the statute 43 Eliz. c. 4 (1601–2).

[See the statements in *A.-G.* v. *Newman* (1 Ch. Cas. 157) (1670); *Eyre* v. *Countess of Shaftesbury* (2 P. Wms. 119) (1722); *A.-G.* v. *Middleton* (2 Ves. Sen. 328) (1751); *A.-G.* v. *Breton* (2 Ves. Sen. 425) (1752); *A.-G.* v. *Mayor of Dublin* (1 Bligh, N. S. 347) (1827); and the remarks of Lord St. Leonard's in *Incorporated Society* v. *Richards* (1 Dr. & War. 319) (1841), and the case prior to the statute 43 Eliz. c. 4 (1601), on which he relies, *Symons' Case* (Duke, B. 163).]

But it is clear from the matters which have been stated above that the proposition that the Court of Chancery had jurisdiction to entertain informations in charity cases prior to the 43 Eliz. is not so much an historical fact as a legal theory of later times.

Charitable commissioners.

Indeed, so far as we find any records of the redress of abuses of charities prior to the 43 Eliz. c. 4 (1600–1), it appears that that statute had been preceded by an earlier Act, namely the 39 Eliz. c. 6 (1596–7), intituled, "An Act to reform deceits and breaches of trust touching lands given to charitable uses," which directed a procedure by commissions in the same way as the Act 43 Eliz. c. 4. And it appears also that the Crown had been accustomed to issue royal commissions to reform abuses in charities before the earlier of these two Acts. One of such commissions may be found set out in full on page 160 of the volume of the Egerton papers published by the Camden Society. It is dated Sept. 13, the 35th Eliz. (1593), and is very much in the form afterwards directed by the above-mentioned statutes. A careful perusal of it will also shew that it follows an established form and was not the first of its kind. It directs, amongst other things, a return to be made to the Chancery. A few cases may be found in Duke's book, dated prior to the 43 Eliz., which are stated to be decisions of commissioners. A search at the Record Office will also reveal commissions for inquiring into charitable matters prior to 1596. [See Exchequer Special Commissions, No. 1131, for an inquiry as to lands of a Lazar Hospital in Kent in 1588, and No. 1693 for an inquiry into the conduct of a master of a free school at Blisworth in 1594.] Royal commissions were probably felt to be inferior in efficacy to parliamentary commissions even in those days, and therefore the above-mentioned Act of the 39 Eliz. c. 6 was passed; and the same was repealed four years later, being superseded by the 43 Eliz. c. 4. The last-mentioned Act is intituled "An Act to redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses." It recites that lands, money, and other kinds of property have been given for various uses therein specified and have not been properly applied, and enacts that it shall be lawful for the Lord Chancellor for the time being, and for the Chancellor of the Duchy of Lancaster for lands within the county Palatine of Lancaster, to award commissions to the bishop of every diocese and his chancellor and to other persons, authorizing

Act of Elizabeth.

them to inquire into all such gifts and the misapplication of any property theretofore given, limited, appointed or assigned, or which thereafter should be given, limited, appointed or assigned to or for any of the charitable and godly uses before rehearsed. The Act further authorizes such commissioners to make decrees with an appeal in every case to the Lord Chancellor and the Chancellor of the Duchy of Lancaster respectively, and exempts from the operation of the Act charities having special visitors, and some others which appeared to have charters providing for their proper regulation.

History of commissions under the Act of Elizabeth.

It has often been observed that this Act was made the basis of certain legal fictions which appear to be wholly unwarranted by it. The Act itself is simple enough, and appears solely to be intended to afford a new procedure for enforcing the proper application of charitable gifts. For this purpose it was used up to the beginning of the present century, and might have continued to be used until the 13th of August, 1888, for it remained wholly unrepealed until that date, although no attempt was made to take proceedings under it after the year 1808. At length, however, it was formally repealed by the Mortmain and Charitable Uses Act, 1888, which received the royal assent on the 13th of August in that year. The procedure appears to have been found convenient when first it was instituted, and it was at one time even extended by statute (22 & 23 Car. 2, c. 20, s. 11 (1670)). But the method of proceeding by information gradually gained ground upon it, and at length superseded it, and the statute of Elizabeth fell into abeyance long ago. The records of the commissions are found in the Petty Bag Department of the Record Office and are well indexed, and show that the jurisdiction flourished down to the middle of the last century, and has been invoked very sparingly since that date. The decline of the jurisdiction is therefore coincident with the decision of Lord Hardwicke in *A.-G.* v. *Bucknall*, which has been mentioned above, and may probably be attributed to that event. But the turn of the tide against commissions is shewn much earlier by the contrast between two cases both involving the point

whether the statute extended to charities with special visitors, when the visitors were themselves trustees of the charity and misapplied its funds. In the first of those cases, *Hynshaw* v. *Corporation of Morpeth* (Hearne, 72; Duke, B. 242) (5 Car. 1) (1629), it was held that such visitors were not within a proviso in the Act exempting charities with special visitors, with the remark that "if it should be otherwise construed this breach of trust would escape unpunished unless in Chancery or in Parliament, which were a tedious and chargeable suit for poor persons." In the later case, *Poor of Chelmsford* v. *Mildmay* (Hearne, 103; Duke, B. 574) (1649), such visitors were held to be within the proviso of the statute, and a bill was ordered to be exhibited against the visitors for redress of the breach of trust.

The report of the last-mentioned case states that the *Morpeth School Case* was cited, so that that case was deliberately overruled.

The report further states that "the other cases before cited" were brought to the attention of the Court. These words appear to be taken from Hearne on Charitable Uses, and to refer to the other cases stated in that book. One of these is the *Sutton Colefield Case* (Hearne, 69; Duke, B. 642) (H. T. 1635), where a decision was given to the same effect as in the *Morpeth Case*, so that the *Sutton Colefield Case* was overruled also.

Another step in the same direction was the decision, already mentioned, in *A.-G.* v. *Newman* (1 Ch. Cas. 157; 1 Levinz, 284) (H. T. 1670), that the Court of Chancery had an original jurisdiction to entertain a charitable information. It appears from the report in 1 Ch. Cas. that a doubt was expressed in that case as to whether relief was obtainable by information in cases coming within the statute of Elizabeth. More than a doubt appears to have been entertained on this point in the earlier case of *Blackston* v. *Hemsworth Hospital* (Duke, B. 644) (1636), where a breach of a charitable trust was brought before the Court by a bill by the trustees of the charity, and a commission was awarded under the statute of Elizabeth. On the other hand, relief procurable under the statute was granted on a bill in the case

between Plat and St. John's College, Cambridge (Duke, B. 379; Hearne, 89) (1638); and in *West* v. *Knight* (1 Ch. Cas. 134) (M. T. 1669) a decision is cited as given in the case of *St. John's College* v. *Plat*, on June 30, 1657, when, by a decree in Chancery on the advice of four judges, it was resolved that upon an original bill the Chancery might relieve within the Statute of Charitable Uses. That precedent was accordingly followed in *West* v. *Knight*, which was an action for a charitable legacy, and the doubt was not raised again. We may here observe that the cases of *A.-G.* v. *Platt* (Finch, 221) (Duke, B. 484) (T. T. 1675) and *Anon.* (1 Ch. Cas. 267) (M. T. 1675) are evidently matters arising in further litigation between the heirs of Plat and St. John's College, and the opening paragraphs of the last-mentioned report are merely a short summary of the earlier litigation and the decisions which have been mentioned above.

A further step in derogation of the statute 43 Eliz. c. 4 was the decision mentioned, appearing in *A.-G.* v. *Matthews* (2 Lev. 167) (1676), that a gift to the poor in general was not within the jurisdiction of the commissioners, but to be determined by the King in the Court of Chancery, upon information by the Attorney-General.

These inroads which were made upon the statute were doubtless to some extent counterbalanced by the publication of Mr. Hearne's and Mr. Duke's books, which set out the statute, with precedents of proceedings under it, and reports of decisions upon it. However, the procedure by information gradually gained more and more favour, and we have seen that in 1741 a decision was given in *A.-G.* v. *Bucknall* (2 Atk. 328), that any person interested might act as relator in a charitable information, and that thereafter the jurisdiction conferred by the statute 43 Eliz. c. 4, fell into disuse. The jurisdiction, however, is treated as being still in vogue in Bridgman's edition of Duke, published in 1805, and in Highmore on Mortmain, published in 1809. But the last commission appears to have issued prior to the last-named year, namely, that in the case of Kirby Ravensworth Hospital, reported 15 Ves. 305, and the total number of com-

missions issued after 1746 appears to have been only three (see the numbers given in Shelford on Mortmain, page 278, and the observations made by Lord Redesdale on the unsatisfactory nature of the jurisdiction (1 Bligh, N. S. 61)). We return, therefore, to the consideration of the procedure by information.

Various forms of suits respecting charities.

Cases sometimes arise in which the misconduct of trustees of charities is an injury both to the Crown, as representing the possible recipients of the charity, and also to some private person or persons who are concerned in the matter. We might consider the case of trustees of a school withholding both the master's salary and the supplies intended for scholars. In such a case a bill and information might be combined, the master suing as plaintiff in the bill, and being named as relator in the information; and it is probable that if the Attorney-General refused to sanction an information in such a case, a bill or action would lie by the party aggrieved against him and the trustees of the charity; at least if the Charity Commissioners sanctioned such a proceeding (*Braund* v. *Earl of Devon* (1868) (L. R. 3 Ch. 800)), or the case was one in which their sanction was not necessary (*Prestney* v. *Mayor and Corporation of Colchester*) (1882) (21 Ch. D. 111)). Indeed, suits have been entertained between the trustees of a Nonconformist church and the minister in possession, without the presence of the Attorney-General (*Davis* v. *Jenkins* (1814) (3 V. & B. 151); *Foley* v. *Wontner* (1820) (2 J. & W. 247); *Leslie* v. *Birnie* (1826) (2 Russ. 114); *Porter* v. *Clarke* (1829) (2 Sim. 520); *Milligan* v. *Mitchell*—motion (1833) (1 M. & K. 446), amendment ordered (1835) (4 L. J. N. S. Ch. 281), amendment held improper (1836) (1 My. & Cr. 433), relief granted (1837) (3 My. & Cr. 72); *Dean* v. *Bennett* (1870) (L. R. 9 Eq. 625), on appeal (6 Ch. 489); *Glen* v. *Gregg* (1882) (21 Ch. D. 513)). Different grounds have been assigned for this jurisdiction (*Davis* v. *Jenkins* (3 V. & B. 157); *Leslie* v. *Birnie* (2 Russ. 119)). An action between the trustees and master of a school may be framed in like manner (*Holme* v. *Guy* (1877) (5 Ch. D. 901)); and apparently an action to try the validity of the election of a parson by parishioners

stands on the same footing (*A.-G.* v. *Parker* (1747) (1 Ves. Sen. 43), commented on in *Davis* v. *Jenkins* (3 V. & B. 157)).

Information might succeed on any ground.

When a suit was instituted by a bill and information combined, it was possible for one branch of the case to fail and the other to succeed, as in *A.-G.* v. *Vivian* (1 Russ. 226) (1826), where the bill was dismissed and the information proceeded. An information, indeed, had always a better chance of success than a bill, for a rule prevailed that it was not necessary for the Attorney-General to point out the specific relief which he claimed; but if it appeared at the hearing that any irregularity existed in the administration of the charity, which called for rectification, it was the duty of the Court to set it right. [See Lord Hardwicke's judgments in *A.-G.* v. *Jeanes* (1 Atk. 354) (1737); *A.-G.* v. *Scott* (1 Ves. Sen. 418) (1750); and *A.-G.* v. *Middleton* (2 Ves. Sen. 327) (1751).] This rule appears to be a logical result of the nature of the proceeding, namely, that the Attorney-General, on behalf of the Crown, calls the attention of the judge to the facts of the case, and the judge, being another officer of the Crown, does justice in the matter. This rule does not appear to be affected by the new rules of procedure. Indeed the tendency has been to assimilate other proceedings to informations in this respect, by allowing amendments at the trial. This rule, of course, tended to encourage informations, and there is no doubt that relators in many cases performed important public duties, and deserved encouragement. But in the course of years another feeling came to prevail. It was true that relators acted at their own peril, and if the information failed they might be ordered to pay all the defendant's costs; and if they succeeded, and proved the trustees of the charity to have acted fraudulently, the trustees might be left to bear their own costs, and be ordered also to pay the costs of the relators. But a vast number of cases lay between these two limits. There were cases in which the trustees had acted in good faith, but had misunderstood their duties; or some usage with respect to the charity had grown up in former years, and the existing trustees had allowed it to continue without inquiring into the original

constitution of the charity. In such cases the Court rectified the administration of the charity for the future, but felt that it could neither order the trustees to pay any costs, or refuse to recoup the relators their outlay incurred in putting the charity into correct legal form. The only course, therefore, open was to allow the costs of all parties out of the charity estate. It was often found that with this result the cure was worse than the malady, and the objects of the charity lost more in the costs of their legal treatment than they had previously lost by the remissness of the trustees. Moreover, the prospect of getting the costs was a temptation to unscrupulous people to discover some trifling irregularity in the administration of some charity, and then file an information to redress it. It was true that no information could be filed without the consent, or *fiat* as it was called, of the Attorney-General, but that officer could not conduct an unofficial trial of every case presented to him, nor could he well refuse his fiat in cases in which an irregularity existed, as such a refusal would have sanctioned the irregularity. Several efforts were therefore made to enable the errors of trustees of charities to be corrected without incurring the expense of an information.

Costs of informations.

The first of these efforts was embodied in an Act called Sir Samuel Romilly's Act, namely the stat. 52 Geo. 3, c. 101. That Act enacts that "in every case of a breach of any trust, or supposed breach of any trust, created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition." The Act then specified the judges to whom the petition should be presented, directing them to make such order therein, and with respect to the costs thereof as should seem just, and made a special provision as to appeals. This jurisdiction is now vested in the High Court of Justice, and assigned to the Chancery Division, and is subject to the general rules as to appeals, the special provision in the Act being repealed (see 44 & 45 Vict. c. 59, s. 3). The Act further pro-

Sir S. Romilly's Act.

vided that every petition under it should be submitted to the Attorney-General, or Solicitor-General (*i.e.* if there was no Attorney-General), and that such official should certify his allowance of it before it should be presented to the Court. A very narrow construction was placed on this Act. Lord Eldon expressed an opinion in the case of *In re Bedford Charity* (2 Swan. 518) (1818), that only persons interested could petition, and this opinion is regarded as law (Tudor on Charities, ch. 5. s. 2, § 6). Other decisions limited the application of the Act to simple cases, and declared that the Court has a discretion in all cases to require the petitioners to proceed by suit (*Ex parte Rees* (3 V. & B. 10) (1814)). It is therefore dangerous to proceed under the Act, though the jurisdiction created by the Act may still be exercised. We shall, however, see hereafter that no petition can now be presented under this Act, nor indeed can any other proceeding be originated respecting any charity subject to the Charitable Trusts Act, 1853, without the consent of the Charity Commissioners, except proceedings *ex officio* by the Attorney-General (16 & 17 Vict. c. 137, ss. 17, 18). A full account of the practice under Sir Samuel Romilly's Act, and of the cases in which it has been held to apply, will be found in Daniel's Chancery Practice, 6th ed. p. 2042, following Tudor on Charities, ch. 5, s. 2. We think, therefore, it is unnecessary to reproduce it here.

A summary of the earlier cases will also be found in a note appended to the case of *Re Hall's Charity* (1851) (14 Beav. 115).

The course of procedure instituted by Sir Samuel Romilly's Act has been extended to other cases. The Act 3 & 4 Vict. c. 77, sometimes called the Grammar Schools Act, 1840, enables the Court of Chancery to adapt old grammar schools to the requirements of modern education in any case then before it, or which might thereafter come before it in any way, and declares that the powers given by the Act may be exercised on petitions presented according to Sir Samuel Romilly's Act.

The Act 8 & 9 Vict. c. 70, s. 22, enables the Court of Chan-

cery to apportion parochial charities when old parishes have been divided, and directs applications for that purpose to be made by petition according to Sir Samuel Romilly's Act. The Court can exercise this jurisdiction repeatedly in the case of the same parish or charity, and can vary or discharge its old orders (*In re Campden Charities* (24 Ch. D. 213 (1883)). But property given for the repair of a particular church will not be apportioned (*In re Church Estate Charity, Wandsworth* (L. R. 6 Ch. 296) (1871), and *A.-G.* v. *Love* (29 L. T. 36)).

We may here mention that by the Charitable Trusts Act, 1855 (18 & 19 Vict. c. 124, s. 10), a power of apportioning parochial charities not exceeding £30 in annual value is given to the Charity Commissioners; and that the 43rd section of the Charitable Trusts Act, 1853, authorizes the Attorney-General to petition *ex officio* under Sir Samuel's Romilly's Act or any Act authorizing petitions according to that Act.

The Charitable Trusts Acts.

We now come to the discussion of the modern Charitable Trusts Acts in full. It was found that Sir Samuel Romilly's Act and the procedure by information were insufficient to prevent charity estates from being occasionally wasted in costs, and there was reason to believe that they were also insufficient to secure the due application of the revenues of endowed charities in all cases. Various parliamentary commissions were therefore appointed from time to time to make inquiries respecting endowed charities, and at length it was felt to be expedient to appoint a standing commission to superintend all such charities in England and Wales. This was accordingly done by the Charitable Trusts Act, 1853, and that Act has been extended and amended by subsequent Acts, and various additional powers and duties have been added by Acts dealing with kindred matters. The general result of these Acts has been to enable the Charity Commissioners to deal with all ordinary questions touching the administration of any endowed charity, and to forbid legal proceedings without their sanction either for the administration of such a charity or the recovery of its property from others, except proceedings by the Attorney-General

acting *ex officio*. The consequence is that whenever any difficulty arises respecting any existing endowed charity it is necessary to apply to the commissioners; and as the course to be adopted is then learnt from them, it appears to be unnecessary to state it very fully in this book. We will therefore content ourselves with giving in the next chapter a very short statement of the principal matters contained in these Acts, and noticing afterwards the decisions which have been given under them.

For further information upon the subject of these Acts we would refer our readers to Mitcheson on the Charity Commission Acts, published in 1887.

CHAPTER XL.

On the Charitable Trusts Acts.

16 & 17 *Vict. c.* 137, *The Charitable Trusts Act*, 1853.

This Act authorized the appointment of a board of officials to be called "The Charity Commissioners for England and Wales" (sect. 6). It gave them power to inquire into charities (sect. 9), and call for accounts (sect. 10), and apply to the Court of Chancery to commit persons refusing to render accounts or answer inquiries (sect. 14), except persons claiming adversely to charities (sect. 15); it authorized trustees of charities to apply for the opinion or advice of the Commissioners, and to act thereon (sect. 16). The 17th section forbids any legal proceeding touching any charity, "not being an application in any suit or matter actually pending," without the sanction of the Board, except as therein otherwise provided; and the other provision is made by the 18th section, which allows the Attorney-General to act *ex officio*, as if the Act had not passed, and declares that his *fiat* or allowance shall still be necessary, where it would have been necessary before the passing of the Act, but that it shall not be necessary for proceedings under the jurisdiction created by the Act. The jurisdiction created by the Act appears in later sections. The 28th section enables the Attorney-General or (subject apparently to sect. 43) any person authorized by the Board to apply by summons in chambers to the Chancery judges, whose jurisdiction is now transferred to the High Court and assigned to the Chancery Division, for any order which might have been made in Court upon suit or petition. A vesting order may be made in chambers under this section, or any order which might be made in Court

Proceedings forbidden without sanction of Board.

Power to make orders on summons.

on petition under any Act of Parliament (*In re Davonport's Charity* (4 De G. M. & G. 839) (March 28, 1855, L. C. Cranworth)).

The 31st section relegates the subject of appeals under this jurisdiction to rules to be issued; and the rules provide that if the Charity Commissioners have not declared the income of the charity to exceed £100 per annum, there can be no appeal without the leave of the judge who made the order (Rules of the Supreme Court, 1883, LV. 14, also 13, and LXV. 24); but when one order deals with several charities whose incomes in the aggregate exceeds £100 per annum, an appeal will lie (*In re Charitable Gifts for Prisoners* (L. R. 8 Ch. 199) (Dec. 19, 1872)).

A result, the contrary of that just mentioned, was arrived at respecting appeals under sect. 8 of the Charitable Trusts Act, 1860; but that section has now been altered (see *In re Hackney Charities* or *Poole and White's Charities* (4 De G. J. & Sm. 588) (Jan. 1865, L.JJ.), and see the Charitable Trusts Act, 1869, s. 10).

The jurisdiction is expressed in the 28th section to be only conferred in the case of charities of which the annual income exceeds £30, and the 29th section gives a similar concurrent jurisdiction to the Chancery of the County Palatine of Lancaster as to charities situated within its jurisdiction. The 30th section, however, extends the jurisdiction to all charities established, or administered, or applicable to purposes within the city of London; and after the 32nd section has given a jurisdiction to district courts of bankruptcy and county courts to make like orders in the case of charities of which the annual income does not exceed £30, the 35th section enables the Board in the last-mentioned cases to authorize the application to be made to the Court of Chancery direct, with power also to authorize such applications to be made in the Palatine Court as to charities within its jurisdiction.

Provision for small charities.

Appeal.

The jurisdiction thus given to district and county courts is subject to appeal, and requires in some cases the approval of the board (sects. 32, 36, 37, 39, 40), who have under sect. 37 a power

of remitting a case, and also a power of appeal with or without such remittal, but the limit of £30 has been raised to £50 by the Act 23 & 24 Vict. c. 136, s. 11. An instance of a successful appeal under this jurisdiction will be found in *Re Donington Church Estate* (8 W. R. 301; 6 Jur. N. S. 290) (March, 1860), holding that the rector and churchwardens alone should be trustees of a charity for repairing a church.

Who may apply.

The 43rd section of the Charitable Trusts Act, 1853, declares that any application under the jurisdiction created or conferred by the Act may be made by the Attorney-General, or, subject to the provisions aforesaid, that is to say, with the sanction of the board, by all or any one of the trustees or persons administering or claiming to administer, or interested in, the charity, which shall be the subject of such application, or any two or more inhabitants of any parish or place within which the charity is administered or applicable. The same section enacts that the Attorney-General, acting *ex officio*, may petition under Sir Samuel Romilly's Act as has been already mentioned.

The 44th section makes the certificate of the board respecting the amount of income sufficient evidence for determining the jurisdiction.

The 46th section preserves the existing rules of law respecting the position of the Established Church. One of these rules is that only members of the Church of England should be appointed trustees of Church of England schools (see the judgment of Jessel, M.R., in *In re Burnham National Schools* (L. R. 17 Eq. 241) (Dec. 1873).

The 51st section provides for the appointment of official trustees of charitable funds, and (somewhat ungrammatically) for the transfer of charitable trust funds to such trustees, voluntarily or under judicial direction.

Excepted charities.

The 62nd section enacts that the Act shall not extend to the Universities of Oxford, Cambridge, London, or Durham, or any college or hall within those of Oxford, Cambridge, and Durham, or to any cathedral or collegiate church, or to any building registered and used as a place of religious worship, or to Queen

Anne's Bounty, or the British Museum, or any friendly or benefit society, or savings bank, or any institution, establishment, or society for religious or other charitable purposes wholly maintained by voluntary contributions, or to the auxiliary or branch associations connected therewith, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from the Act, so far as such business shall be carried on by voluntary contributions or the capital or stock of such business; and when any charity is maintained by subscriptions and endowment, the powers and provisions of the Act shall only apply to the income from endowment; and a general gift or bequest to any such charity as last aforesaid, legally applicable as income, shall not be subject to the Act, nor any sum set apart by any such society for any purpose, nor any gift to any such sum, nor the funds or property situated abroad of any missionary or similar society; but cathedral, collegiate, chapter, and other schools are within the Act. The Act also exempted Roman Catholic charities till Sept. 1, 1855; and this period was annually extended for four years, and expired on Sept. 1, 1859 (18 & 19 Vict. c. 124, s. 47, extending limit to 1st Sept. 1856; 19 & 20 Vict. c. 76, to 1st Sept. 1857; 20 & 21 Vict. c. 76, to 1st Sept. 1858; 21 & 22 Vict. c. 51, to 1st Sept. 1859). The exempted charities were enabled to obtain the benefit of the Act by petitioning for it (sect. 63), and to refer disputes in some cases to the board (sect. 64).

18 & 19 *Vict. c.* 81, *s.* 9, *The Religious Worship Act*, 1855.

The exemption of places of religious worship from the Charitable Trusts Act, 1853, is repeated in this section in rather stronger words.

18 & 19 *Vict. c.* 124, *The Charitable Trusts Amendment Act*, 1855.

The 10th section of this Act enables the board, when a parish is divided, to apportion any parochial charity of which the

annual income does not exceed £30. The 15th section institutes a corporation sole to be "the official trustee of charity lands," and the 18th incorporates "the official trustees of charitable funds" appointed under the Act of 1853.

The 29th section is in the following words:—"It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years." Sales, mortgages, and leases.

The 35th section authorizes money arising from the sale of land to be reinvested in land without any license in mortmain, but this does not dispense with inrolment and the other forms required by the Georgian Mortmain Act.

The 48th section enacts that the word "charity" in the Act of 1853 and this Act shall not include any charity or institution expressly exempted from the Act of 1853. It appears to be clear, therefore, that legal proceedings respecting charities exempted from the Act of 1853 may be taken without any leave from the Charity Commissioners, and this has been so decided, *infrà*.

21 & 22 *Vict. c.* 94, *The Copyhold Act*, 1858.

The 15th section of this Act provides for the case of manors held upon charitable trusts, and allows money arising from the enfranchisement of copyholds in such manors to be paid to the official trustees of charitable funds.

23 & 24 *Vict. c.* 136, *The Charitable Trusts Act*, 1860.

The 2nd section empowers the board, on the application of any person mentioned in the 43rd section of the Act of 1853, to

make orders "for the appointment or removal of trustees for any charity, or for the removal of any schoolmaster or mistress or other officer thereof, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate belonging thereto, or entitling the official trustees of charitable funds, or any other trustees, to call for a transfer of and to transfer any stock belonging to such estate, or for the establishment of any scheme for the administration of any such charity."

But if the charity has a gross annual income of £50 beyond the value of the buildings or land used for the purposes of the charity, then sect. 4 provides that the board shall not exercise this jurisdiction, except upon the application of the trustees of the charity or a majority of them; and sect. 5 adds that they shall not exercise it in contentious cases, which they regard as more fit to be adjudicated by any of the judicial Courts.

Lord Romilly, in the case of *Re Hackney Charities* (12 W. R. 1129) (July, 1864), expressed an opinion that sect. 5 excluded the jurisdiction of the commissioners in contentious cases altogether, but the decision of Lord Romilly in that case was reversed on appeal (4 De G. J. & Sm. 588; 13 W. R. 398) (Jan. 1865) on other grounds, and his opinion as to the effect of sect. 5 was expressly overruled by Jessel, M.R., in *In re Burnham National Schools* (L. R. 17 Eq. 241) (Dec. 1873).

It would seem that the fact that an application had been made to the commissioners would not oust the jurisdiction of the High Court on the same point, but the Court in its discretion would give consideration to that fact, and to the merits of the application itself (see *In re Charitable Gifts for Prisoners* (L. R. 8 Ch. 199)), where an application was made to the Court for a scheme respecting some derelict charities, as to which an application had also been made to the Endowed Schools Commissioners.

Appeals from Board.

The 8th section allows an appeal from the board to the Court of Chancery by certain persons, afterwards limited by sect. 10 of the Charitable Trusts Act, 1869. This jurisdiction is now vested in the High Court of Justice, and any order made under

it is subject to further appeal under the general rules. The case of *In re Campden Charities* (18 Ch. D. 310) (1880, 1881) is an instance of an appeal to the High Court against some provisions of a scheme settled by the Charity Commissioners, and a further appeal by the commissioners against the judgment of Vice-Chancellor Hall. The Court of Appeal held the scheme to be within the powers of the commissioners, and declined to revise a matter left to the discretion of that body, which contained nothing wrong in principle or wrong in law.

In re Burnham National Schools (L. R. 17 Eq. 241) (Dec. 1873, Jessel, M.R.) is another instance of an appeal which failed. The judge held the matter to be within the discretion of the commissioners, and laid down that the Court would not alter an order so made unless it involved a palpable miscarriage of justice.

The 11th section of the Act of 1860 extends the jurisdiction of district courts of bankruptcy and county courts, conferred by sect. 32 of the Act of 1853, to charities of which the annual income does not exceed £50 calculated as aforesaid, that is to say, exclusive of their premises.

The 16th section enables two-thirds of the trustees of a charity to deal with the charity estates in certain cases as effectually as the whole body of trustees could.

25 & 26 *Vict. c.* 112, *named The Charitable Trusts Act*, 1862, *by the Act* 32 & 33 *Vict. c.* 110, *s.* 3.

This Act declares that the Charity Commissioners shall have jurisdiction, notwithstanding any clause in the constitution of a charity providing that certain matters shall be done with the sanction of the Court of Chancery.

32 & 33 *Vict. c.* 110, *The Charitable Trusts Act*, 1869.

The 10th section limits the right of appeal under sect. 8 of the Act of 1860, and apparently only gives such a right to the Attorney-General or any person authorized by him or by the board.

The 12th section gives a retrospective as well as prospective power to a majority of the trustees of a charity estate to deal with it in certain cases.

The 14th section enables exempted charities to have the benefit of the Acts, and the 15th section brings places of worship within them so far as regards the appointment or removal of trustees, the vesting of property, or the establishment of any scheme.

33 & 34 *Vict. c.* 75, *The Elementary Education Act,* 1870.

This Act, which first provided for the institution of school boards, contains a provision (sect. 78) that the Education Department, that is to say, the Lords of the Committee of the Privy Council on Education, shall, for the purposes of the Charitable Trusts Acts, 1853 to 1869, be deemed to be persons interested in any elementary school to which these Acts are applicable, and the endowment thereof.

34 & 35 *Vict. c.* 13, *The Public Parks, Schools, and Museums Act,* 1871.

The 5th section of this Act requires certain deeds and wills to be enrolled in the books of the Charity Commissioners within six calendar months after they come into operation.

35 & 36 *Vict. c.* 24, *The Charitable Trustees Incorporation Act,* 1872.

This Act enables the Charity Commissioners to incorporate the trustees of any charity by granting a certificate to that effect. The 13th section relates to another matter, namely, the enrolment of deeds conveying lands to charities for valuable consideration after the proper time for such enrolment has expired. This subject will be noticed in another place.

37 & 38 *Vict. c.* 87, *The Endowed Schools Act,* 1874.

This Act was passed on the accession of the Conservatives to office in 1874. It dissolved the Endowed Schools Commissioners

and transferred their powers to the Charity Commissioners. The Endowed Schools Commissioners had been appointed under the Endowed Schools Act, 1869, with power (sect. 9) to alter the application of the endowments of endowed schools, other than such schools as mentioned in sect. 8 of the Act, and (sect. 30) to convert to educational purposes, with the consent of the governing body in each case, endowments devoted to (1) doles in money or kind, (2) marriage portions, (3) redemption of prisoners and captives, (4) relief of poor prisoners for debt, (5) loans, (6) apprenticeship fees, (7) advancement in life, or (8) any purposes which had failed altogether or became insignificant in comparison with the magnitude of the endowment, if originally given to charitable uses in or before the year 1800. The jurisdiction of the Endowed Schools Commissioners was somewhat altered by sect. 75 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and by the Endowed Schools Act, 1873 (36 & 37 Vict. c. 87). Exhibitions at the universities tenable by students of particular districts (*e.g.* Wales) are within the jurisdiction created by this Act (*In re The Meyricke Fund* (L. R. 13 Eq. 269) (V.-C. Wickens, Jan. 11, 1872, on appeal, L. R. 7 Ch. 500, May 23, 1872)).

45 & 46 *Vict. c.* 65, *The Prison Charities Act*, 1882.

This Act authorizes the Charity Commissioners to settle a scheme for any prison charity on the application of one of the principal Secretaries of State. The term prison charities includes any charity for the benefit of any prisoners, or any purpose connected with any prisoners or prison.

45 & 46 *Vict. c.* 80, *The Allotments Extension Act*, 1882.

This Act extends the provisions of the Poor Allotments Management Act, 1873 (36 & 37 Vict. c. 19). It enables the Charity Commissioners to aid in letting out in allotments land which has been given for the benefit of the poor.

46 & 47 *Vict. c.* 18, *s.* 3, *The Municipal Corporation Act*, 1883.

This Act provides for the expiration of the charters of some municipal corporations, and thereupon authorizes the Charity Commissioners, and in some cases the Local Government Board, to settle schemes for the administration of the quondam corporate property.

46 & 47 *Vict. c.* 36, *The City of London Parochial Charities Act*, 1883.

This Act gives the Charity Commissioners very full powers to make schemes for the charities described in its title.

50 & 51 *Vict. c.* 49, *The Charitable Trusts Act*, 1887.

This Act enables assistant commissioners to be appointed and otherwise amends the prior Acts.

CHAPTER XLI.

On Cases under the Charitable Trusts Acts.

(1) *Pending Matters.*—(a.) *Money in Court.*

The 17th section of the Act of 1853, requiring the sanction of the Charity Commissioners to legal proceedings, contains an exception of "an application in any suit or matter actually pending."

A conflict of decision at first took place as to whether the payment of money into Court under the Lands Clauses Consolidation Act, or the Trustee Relief Acts, constituted a pending matter within the meaning of these words. Romilly, M.R., held that it did not do so, and that the certificate of the Charity Commissioners and certain other forms were necessary for a petition in such cases (*In re Markwell's Trusts* (17 Beav. 618) (Jan. 30, 1854); *In re London and Brighton Railway Co.* (18 Beav. 608) (1855)). V.-C. Wood was of a contrary opinion, and granted a petition for investment of charity money, intituled in the Lands Clauses Act and the special Act, without any certificate of the commissioners or fiat of the Attorney-General (*Re Cheshunt College* (1 Jur. N. S. 995; 3 W. R. 638) (31 July, 1855)). V.-C. Kindersley had at first followed the former decision (*In re Skeat's Charity* (4 W. R. 28; 1 Jur. N. S. 1037) (9 Nov. 1855)), but on finding that his brother judges were not agreed he desired the point to be brought before the Court of Appeal. This was done accordingly, and the full Court of Appeal at that time, *i.e.* the Lord Chancellor and two Lords Justices, then held that the Charitable Trusts Act, 1853, was not intended to interfere with the jurisdiction of the Court in these and similar cases. They said that the meaning of the words "actually pending," in the exception in sect. 17, was actually pending

when the application was made. The matter being before the Court, by the money being paid into Court, there was nothing to prevent an application being made for its investment (*In re Lister's Hospital* (6 De G. M. & G. 184) (Dec. 19, 1855)). This decision, it will be observed, applies to money paid into Court after the passing of the Charitable Trusts Act, 1853, as well as previously. In all such cases the payment into Court makes it absolutely necessary that an application to the Court should be made, and it would have been a useless expense to fetter every such application with the costs of obtaining a certificate from the Charity Commissioners. In support of the view that payment into Court constitutes a pending matter, we may mention that an affidavit may be filed in it before any petition is presented.

It curiously happens that a practice inconsistent with the principle of the case of *In re Lister's Hospital* has arisen under the existing rules of Court. A summons respecting money paid into Court under the Trustee Relief Acts and other Acts is taken out in the form of an originating summons, though the rules are silent on the point and merely define an originating summons to be a summons by which proceedings are commenced without writ (Rules of the Supreme Court, 1883, Order LXXI. 1). The mere fact of an originating summons being substituted for a petition in some cases would not make a certificate of the Charity Commissioners necessary where it was not previously required.

The case of *In re Lister's Hospital* has been repeatedly followed. The fact that the Charity Commissioners have previously settled a scheme for a charity, whose money is paid into Court under the Lands Clauses Act, makes no difference. And the 35th section of the Charitable Trusts Act, 1855, which authorizes charity trustees, with the sanction of the Board, to reinvest in land money arising from the sale of land does not interfere with the power of the Court to authorize such an investment of money in Court without their sanction (*In re William of Kyngeston's Charity* (W. N. 1881, 143) (Nov. 12, V.-C. Hall)).

The principle of the case has also been held to apply to an

application for the settlement of a scheme for the application of a charitable fund which has been paid into Court under the Trustee Relief Act (*Re St. Giles's and St. George's, Bloomsbury* (25 Beav. 313) (March 25, 1858, M.R.)). And the trustees of a charitable fund may pay a fund into Court without applying to the Charity Commissioners for leave so to do; but by paying the fund into Court they cease to be trustees thereof and have no right to present a petition asking for administration of the fund. It is their duty to give notice of the payment to the Attorney-General and leave him to act. They will then be allowed their costs of attending any petition presented by the Attorney-General, but will have to bear any costs incurred in preparing a petition of their own. If they wish to preserve the right of instituting proceedings they should apply to the Charity Commissioners for a scheme, instead of paying the fund into Court. (See *In re Poplar and Blackwall Free School* (8 Ch. D. 543) (Jessel, M.R., June 1, 1878), where a school had been made over to the School Board, and the trustees paid into Court an endowment fund of which the old trusts were inapplicable to the new state of affairs.)

Payment into Court by trustees.

The payment of money out of Court to charity trustees appears to stand on a somewhat different footing. In the case of *Re Faversham Charities* (10 W. R. 291) (Feb. 15, 1862), where money had been paid in under the Lands Clauses Act, V.-C. Wood refused to make such an order without the sanction of the Charity Commissioners. He based his decision on the ground that the trustees had no independent power of sale. Apparently the Court would not have paid such money over to the trustees before the Charitable Trusts Act, 1853. V.-C. Stuart, however, appears to have ordered money to be paid out to charity trustees under precisely similar circumstances in *Ex parte The Trustees of Tid St. Giles's Charity* (17 W. R. 758) (May 7, 1869). The report mentions no power of sale in the trustees in the last-mentioned case nor consent of the Charity Commissioners.

Payment out of Court.

(b.) *Prior Order Made.*

It is difficult to decide whether a matter is pending when an order has already been duly made by the Court, either on petition or in a suit. If the order is practically a final order, and has been worked out, there is no longer a pending matter.

Thus, in *Re Ford's Charity* (3 Drew. 324) an order had been made in 1826 approving a scheme, and directing the trustees to make certain payments and invest the residue. After the Act a petition was presented asking that part of the charity funds might be laid out in building a new school. V.-C. Kindersley considered that this was a new application, and required the sanction of the Charity Commissioners, but suggested that if the prayer had been to add new rooms to a school established under the scheme, it might have been regarded as ancillary to the former order.

Again, in *Re Jarvis's Charity* (1 Dr. & Sm. 97) (V.-C. K., 8 July, 1859) a scheme had been approved on petition under Sir S. Romilly's Act, and now a petition was presented for the appointment of new trustees and an alteration of the scheme, making three trustees a quorum instead of four. The Vice-Chancellor held that this was a new application, and that the certificate of the Charity Commissioners was necessary.

A.-G. v. *Cooper* (10 W. R. 31) (V.-C. K., Nov. 9, 1861) may be cited as showing a suit still pending, but the sanction of the Charity Commissioners was given to the application in that case. An information had there been filed, and a scheme ordered; but an order had been made suspending the proceedings owing to want of funds. An application was then made for the appointment of new trustees, intituled in the Information and the Trustee Act. That was held to be sufficient.

Excepted Charities.

In our analysis of the Charitable Trusts Act we pointed out that the 48th section of the Act of 1855 rendered it clear that charities exempted from the Act of 1853 by the 62nd section

thereof, were not subject to the 17th; and that proceedings relating to them might still be taken without the sanction of the Charity Commissioners.

Petition for payment of legacy.

This was so decided in *In re Wilson's Will* (19 Beav. 594) (Dec. 20, 1854, Romilly, M.R.). There reversionary legacies were given to two institutions, both supported in great measure by voluntary contributions; and one of these institutions having merged in the other before the legacies became payable, the money was paid into Court under the Trustee Relief Act. The trustees of the amalgamated institution petitioned to have both legacies paid to them, and the judge held the sanction of the commissioners to be unnecessary, because the charities were exempted by sect. 62, and made the order. This decision was given before the judgment in *In re Lister's Hospital* (Dec. 19, 1855), and by the judge who, on Jan. 30, 1854, had held that the sanction was necessary for applications under the Trustee Relief Act by endowed charities.

A similar result was arrived at in the case of *In re Meyrick's Charity* (3 W. R. 435) (V.-C. Kindersley, May 4, 1855). There property had been bequeathed to purchase advowsons for Jesus College, Cambridge. The college wished to build a parsonage-house for a benefice purchased, and presented a petition with that object. It was held that they could petition without the sanction of the Charity Commissioners, inasmuch as colleges in the universities were exempted from the Act of 1853, and the main object of this charity was to benefit the college. The merits of the petition, however, were not decided.

Excepted corporation trustee of unexcepted trust.

In contrast with *In re Meyrick's Charity*, we may mention the case of *A.-G.* v. *Dean and Canons of Manchester and the Ecclesiastical Commissioners* (18 Ch. D. 596) (V.-C. Hall, June 22, 1881). There the first-named defendants were admitted to be a collegiate body exempt from the Charitable Trusts Act, 1853, but they were bound by Act of Parliament to render accounts of their property to the Ecclesiastical Commissioners, and pay the balance of income to them every year for the benefit of the parsons of the district churches in Manchester. The parsons

complained that the accounts which were rendered included improper disbursements, and as the Ecclesiastical Commissioners declined to interfere, they procured the sanction of the Attorney-General to this action in his name on their relation, asking for a mandamus to compel the first defendants to render proper accounts, and for leave to bring further proceedings in the name of the Ecclesiastical Commissioners, if full relief could not be granted in this action. A demurrer was put in on the ground that the certificate of the Charity Commissioners ought to have been obtained, and on other grounds. V.-C. Hall considered that the trust for the parsons was a charity within the Charitable Trusts Act, 1853, and that the action was a proceeding relating to that charity within sect. 17 of that Act. He therefore directed the demurrers to stand over to allow of an application being made to the Charity Commissioners, such being the course usually adopted in these cases; and after the Charity Commissioners had sanctioned the action, he overruled the other grounds of demurrer.

Sale of land.

Another instructive case on this point is *Re Governors of the Charity for the Relief of poor Widows and Children of Clergymen* v. *Sutton* (27 Beav. 651) (Jan. 16, 1860, Romilly, M.R.), elsewhere reported sub nom. *Corporation of Sons of Clergy* v. *Trustees of Stock Exchange* (8 W. R. 167). Here a charity had bought land out of moneys voluntarily subscribed for the general purposes of the charity, and held the land for nearly two centuries. The question was whether they could sell the land without the consent of the Charity Commissioners, inasmuch as the 29th section of the Act of 1855 prohibits sales of charity lands without such consent. It was held that they could do so, on the ground that the case came within the exceptions specified in the 62nd section of the Act of 1853. And the same conclusion was arrived at in the similar case of *Royal Society of London* and *Thompson* (17 Ch. D. 407) (V.-C. Hall, March 4, 1881).

And again in *Finnis and Young* to *Forbes and Pochin* (No. 1) (24 Ch. D. 587) (V.-C. Bacon, May 30, 1883), and ditto (No. 2)

(ibid. 591) it was held (No. 1) that property purchased out of the funds of the Tower Ward of the City of London to be used as offices of the Ward, was not charitable property, and could therefore be sold without the consent of the Commissioners; and (No. 2) that the site of a charity school supported by voluntary contributions could be so sold likewise. In the latter matter the site had been purchased partly out of voluntary contributions and partly out of a sum received on the sale of a lease which had been granted to the trustees of the school.

Account of subscriptions.

In *Strickland* v. *Weldon* (28 Ch. D. 426) (Jan. 1885) an action was brought against a member of a Church Building Committee by other members of the committee for an account of moneys subscribed voluntarily for enlarging a church. Pearson, J., inclined to think that the certificate of the Charity Commissioners was not necessary, as the fund in question was raised by voluntary subscriptions; but he allowed an objection to the action on the ground that it required the fiat of the Attorney-General.

In *Pease* v. *Pattinson* (32 Ch. D. 154) (Feb. 1886) V.-C. Bacon also held that the consent of the Charity Commissioners was unnecessary to an action by the surviving trustee of a fund voluntarily contributed for leave to hand it over to the trustees of a Friendly Society.

A decision contrary to those above mentioned was given by Lord Chelmsford in *A.-G.* v. *Sidney Sussex Coll. Cambridge* (15 W. R. 162; 21 Ch. D. 514, note) (Dec. 4, 1866) holding the certificate of the Commissioners necessary to an information respecting an exempted charity. And Kay, J., felt bound to follow the last-mentioned decision in an action for removing a minister of a registered place of worship, and administering the trusts relating to it. The Court of Appeal, however, explained away Lord Chelmsford's decision, and directed the action to proceed without any certificate from the Commissioners (*Glen* v. *Gregg* (21 Ch. D. 513) (July 26, 1882)).

Removal of minister.

In the last-mentioned case both Kay, J., and the Judges of the Court of Appeal considered that the defendant could not

Waiver of sanction.

give the Court jurisdiction to try the action by waiving any objection to the absence of the certificate of the Charity Commissioners, but Lord Chelmsford, in the case of *A.-G.* v. *Sidney Sussex Coll.*, had allowed the objection to be waived.

Actions at Law.

Action against master.

In *Holme* v. *Grey* (5 Ch. D. 901) (Apr. 24, 1877) it was held by Jessel, M.R., and the Court of Appeal, that the Charitable Trusts Act, 1853, did not render the sanction of the Charity Commissioners necessary to an action which, prior to the Judicature Act, 1873, would have been brought in a Court of Common Law. The statement of claim in that case alleged that the plaintiffs were the governors of a certain school, and that the defendant was in possession of the school and claimed to be master, but that his alleged appointment was invalid, and that he had been lawfully dismissed. The plaintiffs sought by the action to recover possession of the school. The defendant demurred on the ground that the action was brought without the certificate of the Charity Commissioners, and this demurrer was overruled. James, L.J., in giving judgment, said that the Charitable Trusts Act, 1853, was not intended to prevent trustees of a charity from bringing an action of ejectment against a tenant holding over, or of covenant against one who would not pay his rent, or to prevent them from distraining, or taking proceedings against a man who was never properly appointed to an office, but thrusts himself in as a trespasser.

This action eventually came on for trial on the merits, and failed on the ground that the defendant had not been properly dismissed (*Holme* v. *Grey* (W. N. 1877, 258)).

The case of *Holme* v. *Grey* was cited in the above-mentioned case of *A.-G.* v. *Dean and Canons of Manchester*, in support of an argument that the certificate of the Commissioners was not necessary in the last-mentioned case, because the action was for

Mandamus.

a mandamus, which was formerly only procurable in the Court of Queen's Bench. But this argument was overruled on the ground that an action for a mandamus for delivery of an account

of charitable funds was a proceeding within sect. 17 of the Charitable Trusts Act, 1853.

Action by master.

In the converse of *Holme* v. *Grey*, namely, an action by a schoolmaster or other officer of a charity, to restrain the governors from removing him, the certificate of the commissioners is requisite, if the action involves anything more than an injunction to restrain trespass or violence. Thus in *Brittain* v. *Overton* (25 Ch. D. 41, note) (March 19, 1877), Jessel, M.R., held a certificate to be necessary to an action by a schoolmaster, claiming an account of what was due to him; and in *Benthall* v. *Earl of Kilmorey* (25 Ch. D. 39) (July 20, 1883) Chitty, J., came to the same conclusion in an action by the superintendent of a hospital to restrain the committee thereof from disturbing him in his office, ejecting him from his residence, and closing their list of provident members, and suspending the work of the hospital. The last-mentioned case, however, was taken to the Court of Appeal, and affirmed on a different ground, namely, that there was no threat on the defendant's part to do any of the acts mentioned without legal sanction. The judges of the Court of Appeal, however, stated that if the action was brought with any other object beyond preventing the defendants from excluding the plaintiff from his office and house, it clearly required the sanction of the Charity Commissioners.

Account of subscriptions.

An attempt to stretch the principle of *Holme* v. *Grey* was made in *Strickland* v. *Weldon* (28 Ch. D. 427) (Jan. 27, 1885, before Pearson, J.). In that case a committee had been appointed to collect subscriptions for improving a church. The vicar of the parish was a member of the committee, but retired from it on leaving the parish, and this action was then brought against him by some members of the committee on behalf of all the committee, for an account of the subscriptions received by him. Pearson, J., held that the Attorney-General was the only person who could sue for such a purpose, and refused to give any leave to amend. He left the point undecided as to whether the sanction of the commissioners was necessary, as has been mentioned above.

Unexempted Charities.

In the case of *Re Bingley School* (2 Drew, 283) (V.-C. K., April 29, 1854) a private Act, which was passed four days after the Charitable Trusts Act, 1853, gave a power of sale on application to a Chancery judge in chambers. This was held not to dispense with the necessity of a certificate from the Charity Commissioners.

In *Ex parte Watford Burial Board* (2 Jur. N. S. 1045) a certificate from the commissioners was held necessary before the Court would entertain a proposal to convey parish land to a burial board to be used as a cemetery.

In *Braund* v. *Earl of Devon* (L. R. 3 Ch. 800) (July 21, 1868, L.JJ. Wood and Selwyn) a testator had left the residue of his pure personal estate on certain trusts, which were assumed to be valid, for establishing a school, in which a preference should be given to his nearest male relatives of certain ages. His three nearest male relatives of the prescribed ages brought a bill against his executors and the Attorney-General to have the school established. A question was raised and not decided as to whether the plaintiffs could maintain such a bill, instead of getting the Attorney-General to file an information. But it was decided that such a bill could not be brought without a certificate from the Charity Commissioners, and a demurrer on that ground was allowed accordingly.

School.

The objection that the certificate of the commissioners is necessary could be taken by motion as well as by demurrer. *Hodgson* v. *Forster* (W. N. 1877, p. 74) is an instance of this. The Master of the Rolls there stayed an action claiming a fund bequeathed upon charitable trusts, but intimated his willingness to entertain it if the sanction of the Commissioners were given.

Motion.

Another case which should be cited in this connection is *Prestney* v. *Mayor and Corporation of Colchester and the A.-G.* (21 Ch. D. 111) (V.-C. H., April 26, 1882). In that case it was held that the certificate of the Charity Commissioners was not

necessary, on the ground that the subject of the action was not a charity for that purpose. It was indeed a claim by the corporators against the corporation for a declaration of their right to enjoy certain parts of the corporate property in a certain way. The claim was based on sect. 2 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 36). That Act sanctioned the perpetual devotion of property to a purpose which was not a public purpose. But it seems to us that on principle the purpose so sanctioned should have been held to be a charity in the eye of the law. On this point reference may be made to the cases of *In re Dutton* (1878) (4 Ex. D. 54); *Goodman* v. *Mayor of Saltash* (Aug. 1882) (7 App. Cas. 633); *In re Christchurch Inclosure Act*, 1888 (38 Ch. D. 520). We may also here mention the case of: Claim of corporators.

In re Norwich Town Close Estate (W. N. (1888) 173; 32 S. J. 629). There the freemen of Norwich had established certain rights over certain land. The Attorney-General then applied for a scheme to regulate those rights under sect. 28 of the Charitable Trusts Act, 1853. It was held that he must first establish by independent proceedings that the rights were charitable before he could proceed under that Act.

In *In re Duncan, In re Taylor's Trusts* (L. R. 2 Ch. 356) (March 8, 1867, L.JJ. Turner and Cairns), a charity had been created by will for the promotion of Christian education in Jamaica. The trust funds were invested on mortgage of land in England, and the trustees all resided in England. One trustee having become lunatic, a petition for the appointment of new trustees was presented. The Court considered the certificate of the commissioners to be necessary, and expressed an opinion that it would also be necessary for a charity applicable in England or Wales, but having an endowment elsewhere.

Power to call for Accounts. Charitable Trusts Act, 1853, *s.* 10.

It will be seen that the Charitable Trusts Act, 1853, authorizes the commissioners to call for accounts of charities (sect. 10), and declares persons, who refuse to render accounts, guilty of contempt of Court, and liable to committal (sect. 14). An

application under these sections should now be made in the Chancery Division of the High Court of Justice. It results from these enactments that, whenever any persons dispute their liability to render accounts to the commissioners, the question is tried on a motion to commit them. The Court, however, does not order committal in the first instance in these cases, but declares the liability of the respondents to render accounts, awards the costs of the motion, and defers the drawing up of the order to give the respondents time to render the accounts. See *In re Sir Robert Peel's School* (L. R. 3 Ch. 543) (April, 1868, L.JJ.), where the respondent shewed that the will creating the charitable trust gave him power to revoke it, and it was held that as he had not revoked it, he was liable to account. The same case shews that on such a motion the respondent cannot bring himself within sect. 15 of the Act by merely alleging that he has a claim adverse to the charity, if the admitted facts shew that no such adverse claim really exists.

Another application under this jurisdiction will be found in *In re St. Bride's Estate* (W. N. 1877, 95) (M.R., April 16), and on appeal (p. 149, June 9), where parish property was held to be charitable property, and an order was made involving an undertaking by the respondents to render accounts within a month. And an application under a corresponding section in the Endowed Schools Act, 1869, will be found in *In re the Meyricke Fund* (L. R. 13 Eq. 269), and on appeal (L. R. 7 Ch. 500).

CHAPTER XLII.

On the Mortmain and Charitable Uses Act, 1888.

[51 & 52 Vict. c. 42.]

ARRANGEMENT OF SECTIONS.

The following Index is prefixed to the Statute.

PART I.

Mortmain.

Section.

1. Forfeiture on unlawful assurance or acquisition in mortmain.
2. Power to Her Majesty to grant licences in mortmain.
3. Saving for rents and services.

PART II.

Charitable Uses.

4. Conditions under which assurances may be made to charitable uses.
5. Power to remedy omission to enrol within requisite time.

PART III.

Exemptions.

6. Assurances for a public park, elementary school, or public museum.
7. Assurances for certain universities, colleges, and societies.
8. Substitution of provisions of Act for corresponding repealed enactments.

PART IV.

SUPPLEMENTAL.

Section.
9. Adaptation of law to system of land registration.
10. Definitions.
11. Extent of Act.
12. Savings for existing customs, &c.
13. Repeal.
14. Short title.

SCHEDULE.

NOTE.—In the print of the Act, which follows, we have placed in the margin of each clause, which reproduces an old enactment, a reference to the enactment so reproduced. It will be seen that the enactments themselves are formally repealed by the schedule.

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51 & 52 VICT. c. 42.

An Act to consolidate and amend the Law relating to Mortmain and to the disposition of Land for Charitable Uses.

[13*th August*, 1888.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

MORTMAIN.

Forfeiture on unlawful assurance or acquisition in mortmain.

7 Edw. 1, st. 2, c. 1.

1.—(1.) Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid, the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly:

(2.) Provided as follows:

(i.) If the land is held directly of a mesne lord under Her

Majesty, that mesne lord may enter on and hold the land at any time within twelve months from the date of the assurance:

(ii.) If the land is held of more than one mesne lord in gradation under Her Majesty, the superior of those mesne lords may enter on and hold the land at any time within six months after the time at which the right of the inferior lord to enter on the land expires:

(iii.) If a mesne lord is at the time when his right of entry accrues under this Act a lunatic or otherwise under incapacity, his right of entry may be exercised by his guardian or the committee of his estate, or by such person as Her Majesty's High Court of Justice may appoint in that behalf:

(iv.) If the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty.

Power to Her Majesty to grant licences in mortmain. 7 & 8 Will. 3, c. 37.

2. It shall be lawful for Her Majesty the Queen, if and when and in such form as she thinks fit, to grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise, and to grant to any corporation a licence to acquire land in mortmain, and to hold the land in perpetuity or otherwise.

Saving for rents and services. 7 Edw. 1, st. 2, c. 1.

3. No entry or holding by or forfeiture to Her Majesty under this part of this Act, shall merge or extinguish, or otherwise affect, any rent or service which may be due in respect of any land to Her Majesty or any other lord thereof.

Remarks.

These first three sections of the Act reproduce in clearer language the apparent effect of the old Plantagenet Mortmain Acts (7 Edw. 1, st. 2, c. 1 de viris Religiosis; 13 Edw. 1, c. 32; 18 Edw. 3, st. 3, c. 3; and 15 Ric. 2, c. 5), together with the Act 7 & 8 Will. 3, c. 37. All these Acts are formally repealed by the Schedule to the present Act.

The clause (iii.) of sect. 1 does not expressly appear in any of the repealed Acts, but it is probably merely an enunciation of the prior law so far as the guardian and committee are

concerned. The power for the High Court of Justice to appoint a person to exercise the right of entry appears to be new. The statute 7 Edw. 1 merely expressed to give the Crown power to enter if all the mesne lords, being of full age, within the four seas, and out of prison, neglected to enter.

The second section is a reproduction of the Act 7 & 8 Will. 3, c. 37.

The third section corresponds to a sentence towards the end of the statute 7 Edw. 1, st. 2, c. 1.

PART II.

Charitable Uses.

Conditions under which assurances may be made to charitable uses.

4.—(1.) Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void.

9 Geo. 2, c. 36.

(2.) The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof.

9 Geo. 2, c. 36.

(3.) The assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assuror or of any person claiming under him.

24 Vict. c. 9, s. 1.

(4.) Provided that the assurance, or any instrument forming part of the same transaction, may contain all or any of the following provisions, so, however, that they reserve the same benefits to persons claiming under the assuror as to the assuror himself; namely,

(i.) The grant or reservation of a peppercorn or other nominal rent;

(ii.) The grant or reservation of mines or minerals;

(iii.) The grant or reservation of any easement;

(iv.) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, and

covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighbouring land;

(v.) A right of entry on nonpayment of any such rent or on breach of any such covenant or provision;

(vi.) Any stipulations of the like nature for the benefit of the assuror or of any person claiming under him.

(5.) If the assurance is made in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rentcharge, or other annual payment reserved or made payable to the vendor, or any other person, with or without a right of re-entry for non-payment thereof. 24 Vict. c. 9; 27 Vict. c. 13, s. 4.

(6.) If the assurance is of land, not being land of copyhold or customary tenure, or is of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses. 9 Geo. 2, c. 36; 24 Vict. c. 9, s. 1.

(7.) If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made at least twelve months before the death of the assuror, including in those twelve months the days of the making of the assurance and of the death. 9 Geo. 2, c. 36.

(8.) If the assurance is of stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made by transfer thereof in the public books kept for the transfer of stock at least six months before the death of the assuror, including in those six months the days of the transfer and of the death. 9 Geo. 2, c. 36.

(9.) If the assurance is of land, or of personal estate other than stock in the public funds, it must, within six months after the execution thereof, be enrolled in the Central Office of the Supreme Court of Judicature, unless in the case of an assurance of land to or for the benefit of charitable uses those uses are declared by a separate instrument, in which case that separate 9 Geo. 2, c. 36. 24 Vict. c. 9, s. 2.

instrument must be so enrolled within six months after the making of the assurance of the land.

Remarks.

This 4th section is a reproduction of part of the Georgian Mortmain Act (36 Geo. 2, c. 36), and the enactments mitigating the same (24 Vict. c. 9, and 27 Vict. c. 13, s. 4). The Central Office of the Supreme Court of Judicature is, of course, substituted for the Chancery Enrolment Office. The words of the Act 24 Vict. c. 9, s. 1 are reproduced almost verbatim, but in the case of the Georgian Mortmain Act the words on which the doctrine of impure personalty is based are omitted; and the Act fairly raises a question as to whether this doctrine is abolished altogether. We shall discuss this question a little later, when we arrive at the interpretation clause, and express our opinion that the law is left unaltered in this respect.

Power to remedy omission to enrol within requisite time.

29 & 30 Vict. c. 57.

5.—(1.) Where an instrument, the enrolment whereof is required under this part of this Act for the validation of an assurance, is not duly enrolled within the requisite time, Her Majesty's High Court of Justice, or the officer having control over the enrolment of deeds in the Central Office, may, on application in such manner and on payment of such fee as may be prescribed by rules of the Supreme Court, and on being satisfied that the omission to enrol the instrument in proper time has arisen from ignorance or inadvertence, or through the destruction or loss of the instrument by time or accident, and that the assurance was of a nature to be validated under this section, order or cause the instrument to be enrolled.

29 & 30 Vict. c. 57.

(2.) Thereupon, if the assurance to be validated was made in good faith and for full and valuable consideration, and was made to take effect in possession immediately from the making thereof without any power of revocation, reservation, condition, or provision, except such as is authorized by this Act, and if at the time of the application possession or enjoyment was held under the assurance, then enrolment in pursuance of this section shall have the same effect as if it had been made within the requisite time:

29 & 30 Vict. c. 57, s. 4.

(3.) Provided that if at the time of the application any proceeding for setting aside the assurance, or for asserting any right

founded on the invalidity of the assurance, is pending, or any decree or judgment founded on such invalidity has been then obtained, the enrolment under this section shall not give any validity to the assurance.

(4.) Where the instrument omitted to be enrolled in proper time has been destroyed or lost by time or accident and the trusts thereof sufficiently appear by a copy or abstract thereof or some subsequent instrument, such copy, abstract, or subsequent instrument may be enrolled under this section in like manner and with the like effect as if it were the instrument so destroyed or lost. 29 & 30 Vict. c. 57; 35 & 36 Vict. c. 24, s. 13.

(5.) An application under this section may be made by any trustee, governor, director, or manager of, or other person entitled to act in the management of or otherwise interested in, any charity or charitable trust intended to be benefited by the uses declared by the instrument to be enrolled. 29 & 30 Vict. c. 57.

Remarks.

This 5th section is substantially a reproduction of the Act 29 & 30 Vict. c. 57, together with sect. 13 of the Act 35 & 36 Vict. c. 24, but the words here used are slightly more extensive, in as far as they expressly authorize the enrolment of a copy or abstract of a deed.

The statute 29 & 30 Vict. c. 57 had been preceded by three temporary Acts of similar import, allowing subsequent enrolment within a limited time in each case. These Acts had all expired, and they are now formally repealed by the schedule to the present Act, together with the Act 29 & 30 Vict. c. 57 and sect. 13 of the Act 35 & 36 Vict. c. 24.

PART III.

Exemptions.

Assurances for a public park, elementary school, or public museum. 34 Vict. c. 13, s. 4.

6.—(1.) Parts One and Two of this Act shall not apply to an assurance by deed of land of any quantity or to an assurance by will of land of the quantity hereinafter mentioned for the purposes only of a public park, a schoolhouse for an elementary school, a public museum, or an assurance by will of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only:

34 Vict. c. 13, s. 5.

(2.) Provided that a will containing such an assurance, and a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration, must be executed not less than twelve months before the death of the assuror, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assuror, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator, or in case of a deed the execution of the deed.

34 Vict. c. 13, s. 6.

(3.) The quantity of land which may be assured by will under this section shall be any quantity not exceeding twenty acres for any one public park, and not exceeding two acres for any one public museum, and not exceeding one acre for any one schoolhouse.

34 Vict. c. 13, s. 3.

(4.) In this section:—

(i.) "public park" includes any park, garden, or other land dedicated or to be dedicated to the recreation of the public;

(ii.) "elementary school" means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed ninepence a week;

(iii.) "schoolhouse" includes the teacher's dwelling-house, the playground (if any), and the offices and premises belonging to or required for a school;

(iv.) "public museum" includes buildings used or to be used for the preservation of a collection of paintings or other works of art, or of objects of natural history, or of mechanical or philosophical inventions, instruments, models, or designs, and dedicated or to be dedicated to the recreation of the public, together with any libraries, reading rooms, laboratories, and other offices and premises used or to be used in connexion therewith.

This 6th section is a reproduction, almost verbatim, of the Act 34 Vict. c. 13. The only portion of it which appears to be new is the clause in sect. 2, allowing a devise, which is a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assurer. Remarks.

7.—Part Two of this Act shall not apply to the following assurances: Assurances for certain universities, colleges, and societies.

(i.) An assurance of land, or personal estate to be laid out in the purchase of land, to or in trust for any of the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, or any of the colleges or houses of learning within any of those universities, or to or in trust for any of the Colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations of those last-mentioned colleges, or to or in trust for the warden, council, and scholars of Keble College: 9 Geo. 2, c. 36, s. 4.

(ii.) An assurance, otherwise than by will, to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science, or other like purposes of land not exceeding two acres for the erection thereon of a building for such purposes, or any of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected, so that the assurance be made in good faith for full and valuable consideration: 31 & 32 Vict. c. 44, s. 1.

Provided that the trustees of the instrument containing any assurance to which this section applies or declaring the trusts thereof, may, if they think fit, at any time cause the instrument to be enrolled in the Central Office of the Supreme Court of Judicature. 31 & 32 Vict. c. 44, s. 2.

The first sub-sect. of this 7th section is a re-enactment of the 4th section of the Georgian Mortmain Act, with the addition of the Universities of London and Durham, the Victoria University, Remarks.

and the colleges or houses of learning in them, and with the express addition of Keble College. The reason for expressly mentioning Keble College is not very clear. A question was raised under the Georgian Mortmain Act whether colleges added to the older universities after the date of the Act enjoyed the privilege of exemption from the Act; and a similar question may perhaps be raised under this Act. But the present Act clearly included all colleges and houses of learning in any of the specified universities, existing at the date of its passing (Aug. 13, 1888). And Keble College appears clearly to answer that description. The express mention of Keble College is probably made merely *ex majori cautelâ*.

The second sub-section of this section is a reproduction of the Act (31 & 32 Vict. c. 44) in somewhat shortened language. It will be seen that it only applies to conveyances *inter vivos* for full consideration.

Substitution of provisions of Act for corresponding repealed enactments.

8. Where by any statute now in force any provision of the enactments hereby repealed is excluded either wholly or partially from application, or is applied with modification, in every such case the corresponding provision of this Act shall be excluded or applied in like extent and manner.

Remarks.

This section appears to us to preserve all the general and special exemptions from the Georgian Mortmain Act, which previously existed, besides those which are expressly re-enacted in this Act. For a list of such general and special exemptions we must refer our readers to the chapters in this book devoted to those two subjects respectively.

PART IV.

Supplemental.

Adaptation of law to system of land registration. 38 & 39 Vict. c. 87.

9. Any assurance of land which is by this Act required to be made by deed may be made by a registered disposition under the provisions of the Land Transfer Act, 1875, or of any Act amending the same, and any assurance so made shall be exempt from the provisions of this Act as to execution in the presence of witnesses, and as to enrolment in the central office of the Supreme Court.

Remark.

(This provision appears to be new.)

10. In this Act, unless the context otherwise requires— Definitions.

(i.) "Assurance" includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and "assure" and "assuror" have meanings corresponding with assurance.

(ii.) "Will" includes codicil.

(iii.) "Land" includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land.

(iv.) "Full and valuable consideration" includes such a consideration either actually paid upon or before the making of the assurance, or reserved or made payable to the vendor or any other person by way of rent, rent-charge, or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry for non-payment thereof, or partly paid and partly reserved as aforesaid. 27 Vict. c. 13, s. 4.

Remarks.

The definition of "full and valuable consideration," which is here given, is based, to some extent, on the provisions of sect. 4 of the Act 27 Vict. c. 13.

The definition of land is most material. It will be noticed that the first part of the Act prohibits unlicensed conveyances of land to corporations, and the second part forbids assurances of land and money to be laid out in land for charitable purposes without the prescribed formalities; and now land is defined to include any estate and interest in land, but that is all. Now sect. 3 of the Georgian Mortmain Act, which gave rise to the doctrine of impure personalty, avoided not only gifts of land and any estate or interest therein, but also gifts of any charge or incumbrance affecting or to affect any land; and the case of money to be laid out in land was extended in like manner. Moreover, the doctrine of impure personalty was never applied to gifts to corporations, except that leasehold estates were included in the old Plantagenet Mortmain Acts.

We see, therefore, that several contentions may be raised as to the construction of the present Act. It may be said that

henceforth the property prohibited to be given to corporations, and that prohibited to be given in charity, are to be the same; and that only such property as is forfeited, if given to a corporation without licence, is henceforth to be affected by the restriction on charitable gifts. This is equivalent to saying that the doctrine of impure personalty is abolished, or cut down to leasehold interests in land. On the other hand, it may be urged that the doctrine of impure personalty is not only preserved, but also extended to gifts to corporations. A third contention may also be raised, to the effect that a portion of the doctrine is preserved and extended under the words "any estate and interest in land," while another portion is abolished owing to the omission of the words, "any charge or incumbrance affecting or to affect any land."

We see that a good deal may be said in favour of all these views, but we nevertheless believe that the intention of Parliament in passing the Act was to preserve the old law both as to impure personalty, and the property subject to the Plantagenet Mortmain Acts. And we believe that the Courts will adopt this view, and consider that the difficulty has been caused by inadvertence, and that a preservation of the old law is warranted by the words of the Act. It will be seen that the Act is intituled "An Act to consolidate and amend the law," and that it contains no recital that it is expedient to amend it, and moreover that the rest of the Act consists of a clear consolidation of the old law without any alteration of importance. The addition of the new universities in sect. 7, and the new will reproducing an old one in sect. 6, § 2, are really the only amendments worth mentioning. Surely such a material alteration as the abolition of the doctrine of impure personalty should be signified in a more distinct manner than the introduction of a common interpretation clause for two parts of an Act which deal with different subjects. And observe that the 10th section enacts that, in the Act, unless the context otherwise requires, land and the other words shall include the matters specified. May we not read this as saying that land shall include impure personalty unless the context otherwise requires, and that in the 1st section, where we hear that land shall not be assured to or for any corporation in mortmain, the words in mortmain are a context, which requires land to have a less extensive signification? The whole of the rest of the 1st section contemplates land which is held of the Crown or some intermediate lord, and speaks of a right of entry as accruing on its forfeiture, and the 2nd and 3rd sections use expressions only appropriate to land in its usual

sense. On the other hand the 4th section expressly mentions personalty to be laid out in land as well as land itself, and thus indicates an intention to adopt to that extent the policy of the Georgian Mortmain Act. It will be unfortunate indeed if the doctrine of impure personalty is to be re-opened, and every question which has been settled under the Georgian Mortmain Act is to be re-argued under the words of the present statute. The law, as it stood before this Act, may not have been based upon clear philosophical distinctions, or sound political or economic views, but at least it had become settled by a long course of decisions, and it in general enabled the estate of a charitable testator to be administered without costly litigation. Let us hope that this happy condition may not be disturbed by the present enactment. Surely, if the legislature had intended to alter the law on this well-known point, it would have stated distinctly what kinds of property were, and what were not, to be subject to the restrictions imposed on charitable gifts.

Extent of Act.

11. This Act shall not extend to Scotland or Ireland.

Savings for existing customs, &c.

12. Nothing in this Act shall affect the operation or validity of any charter, licence, or custom in force at the passing of this Act enabling land to be assured or held in mortmain.

Remarks.

This 12th section preserves the custom of the city of London, and all licences to hold land in mortmain contained in any charter, or granted by the Crown by any other document. Licences contained in any statute are also saved by the 8th section.

Repeal.

13.—(1.) The Acts specified in the schedule to this Act are hereby repealed, from and after the passing of this Act, to the extent specified in the third column of that schedule:

Provided that this repeal shall not affect—

(*a*) Any enactment not hereby repealed referring to any enactment hereby repealed, except that in lieu of that reference the unrepealed enactment shall be construed as if it referred to the corresponding provisions of this Act; or

(*b*) The past operation of any enactment hereby repealed, or any instrument or thing executed, done or suffered before the passing of this Act; or

(*c*) Any right, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed; or

(*d*) Any action, proceeding, or thing pending or uncompleted at the time of the passing of this Act.

(2.) Whereas by the preamble to the Act of the forty-third year of Elizabeth, chapter four (being one of the enactments hereby repealed), it is recited as follows:

"Whereas landes tenementꝭ rentes annuities ꝑfittes hereditamentes, goodes chattels money and stockes of money, have bene heretofore given limitted appointed and assigned, as well by the Queenes moste excellent Majestie and her moste noble progenitors, as by sondrie other well disposed ꝑsons, some for releife of aged impotent and poore people, some for maintenance of sicke and maymed souldiers and marriners, schooles of learninge, free schooles and schollers in univ̄sities, some for repaire of bridges portes havens causwaies churches seabankes and highewaies, some for educac̄on and p̄fermente of orphans, some for or towardes reliefe stocke or maintenance for howses of correcc̄on, some for mariages of poore maides, some for supportac̄on ayde and helpe of younge tradesmen, handiecraftesmen and ꝑsons decayed, and others for releife or redemption of prisoners or captives, and for aide or ease of any poore inhabitantꝭ conc̄ninge paymente of fifteenes, settinge out of souldiers and other taxes; whiche landes tenements rents annuities ꝑfitts hereditaments goodes chattells money and stockes of money nev̄theles have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of fraudes breaches of truste and negligence in those that shoulde pay delyver and imploy the same:" and whereas in divers enactments and documents reference is made to charities within the meaning, purview, and interpretation of the said Act:

Be it therefore enacted that references to such charities shall be construed as references to charities within the meaning, purview, and interpretation of the said preamble.

Short title.

14. This Act may be cited as the Mortmain and Charitable Uses Act, 1888.

SCHEDULE.

Acts Repealed.

Note.—This schedule is to be read as referring to the Revised Edition of the Statutes prepared under the direction of the Statute Law Committee, in all cases of statutes included in that edition as already published.

The chapters of the statutes (before the division into separate Acts) are described by the marginal abstracts given in that edition.

Session and Chapter.	Title.	Extent of Repeal.
7 Edw. 1 . .	*Statut' de Viris Religiosis* . .	The whole Act.
13 Edw. 1, c. 32 .	Remedy in case of mortmain under judgments by collusion.	The whole chapter.
18 Edw. 3, st. 3, c. 3	Prosecutions against religious persons for purchasing lands in mortmain.	The whole chapter.
15 Ric. 2, c. 5 .	St. 7 Edw. 1, de Religiosis. Converting land to a churchyard declared to be within that statute. Mortmain where any is seised of lands to the use of spiritual persons. Mortmain to purchase lands in guilds, fraternities, offices, commonalties, or to their use.	The whole chapter.
23 Hen. 8, c. 10 .	An Acte for feoffments and assurannce of landes and tenements made to the use of any parisshe Churche, Chapell, or suche like.	The whole Act.
43 Eliz. c. 4 . .	An Acte to redresse the misemployment of landes, goodes, and stockes of money heretofore given to charitable uses.	The whole Act.

Session and Chapter.	Title.	Extent of Repeal.
7 & 8 Will. 3, c. 37	An Acte for the encouragement of charitable gifts and dispositions.	The whole Act.
9 Geo. 2, c. 36 .	An Act to restrain the disposition of lands whereby the same become inalienable.	The whole Act, except so much of section five as is unrepealed.
9 Geo. 4, c. 85 .	An Act for remedying a defect in the titles of lands purchased for charitable purposes.	The whole Act.
24 & 25 Vict. c. 9 .	An Act to amend the law relating to the conveyance of land for charitable uses.	The whole Act.
25 & 26 Vict. c. 17.	An Act to extend the time for making enrolments under the Act passed in the last session of Parliament, intituled, "An Act to amend the law relating to the conveyance of land for charitable uses, and to explain and amend the said Act."	The whole Act.
27 & 28 Vict. c. 13.	An Act to further extend the time for making enrolments under the Act passed in the twenty-fourth year of the reign of Her present Majesty, intituled, "An Act to amend the law relating to the conveyance of lands for charitable uses, and otherwise to amend the said law."	The whole Act.
29 & 30 Vict. c. 57.	An Act to make further provision for the enrolment of certain deeds, assurances, and other instruments relating to charitable trusts.	The whole Act.
31 & 32 Vict. c. 44.	An Act for facilitating the acquisition and enjoyment of sites for buildings for religious, educational, literary, scientific, and other charitable purposes.	Sections one and two.

Session and Chapter.	Title.	Extent of Repeal.
34 & 35 Vict. c. 13.	An Act to facilitate gifts of land for public parks, schools, and museums.	The whole Act.
35 & 36 Vict. c. 24.	An Act to facilitate the incorporation of trustees of charities for religious, educational, literary, scientific, and public charitable purposes, and the enrolment of certain charitable trust deeds.	Section thirteen.

Remarks.

It will be seen that the first four statutes hereby repealed are the old Plantagenet Mortmain Acts, and that the substance of them is re-enacted in the present Act, ss. 1 and 3. The 5th Act is the 23 Hen. 8, c. 10. This is not re-enacted. A discussion of it will be found in this book in the chapter on Superstitious Gifts, and it will be there seen that the statute had become practically a dead letter. The 43 Eliz. c. 4 is also repealed and not re-enacted. This statute is discussed in the chapter on Procedure, and mentioned in other parts of this book. It will be seen that this statute merely established a method of redressing charitable trusts by means of commissions, which fell into abeyance long ago, being superseded by a more efficacious method of procedure, namely by information.

The Statute 7 & 8 Will. 3, c. 37, is that which authorized the Crown alone to grant licences in mortmain. It is re-enacted in the present Act, in s. 2.

The Statute 9 Geo. 2, c. 36, is the Georgian Mortmain Act. The substance of it is re-enacted in the present Act, in s. 4, with the modifications already existing, and other trifling modifications, which are pointed out in this chapter. With respect to the 5th section the case is as follows. It will be seen that the colleges or houses of learning in the two Universities and the colleges of Eton, Winchester, and Westminster, are mentioned in the 4th section; and then the 5th enacts that no such college or house of learning shall acquire a greater number of advowsons than half the number of its fellows. Subsequently the Act 45 Geo. 3, c. 101, recited that it was provided by the Georgian Mortmain Act that no college or house of learning in either of the two Universities should acquire more advowsons

than half its number of fellows, and that this restriction was found to be prejudicial, and it was enacted that so much of the Georgian Mortmain Act as was thereinbefore recited should be repealed.

The present statute contains a legislative recognition of the fact that some portion of the 5th section of the Georgian Mortmain Act is left unrepealed; that must be that it applied and still applies to the colleges of Eton, Winchester, and Westminster.

The Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63), rather curiously includes the Act 45 Geo. 3, c. 101, in its schedule of statutes thereby repealed; but it provides that, where any enactment not in the schedule is repealed by any enactment in the schedule, such repeal shall not be thereby affected. And the Georgian Mortmain Act is not in the schedule; and the Act 45 Geo. 3, c. 101, does nothing but effect the repeal abovementioned; so that its repeal by the Statute Law Revision Act, 1872, is a mere verbal repeal, leaving its operation unaffected.

The Act 9 Geo. 4, c. 85, had a merely retrospective operation curing the omission to enrol a certain class of conveyances for charitable purposes, which had been erroneously supposed not to need enrolment.

The Acts 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; and 27 & 28 Vict. c. 13, contained some provisions of temporary duration which had expired. They allowed a subsequent enrolment of charitable conveyances in certain cases. The Act 29 & 30 Vict. c. 57 was a permanent Act to the same effect, and was supplemented by s. 13 of the Act 35 & 36 Vict. c. 24, the last enactment in the above schedule. The substance of these enactments is reproduced in the present Act, in s. 5.

The Act 24 & 25 Vict. c. 9, also contained some important modifications of the Georgian Mortmain Act, and there were clauses in the Acts 25 & 26 Vict. c. 17, and 27 & 28 Vict. c. 13, explaining or amending these modifications. The substance of these enactments is reproduced in s. 4 of the present Act.

The substance of ss. 1 and 2 of the Act 31 & 32 Vict. c. 44 is also reproduced in s. 7, § 2, of the present Act; and the substance of the Act 34 & 35 Vict. c. 13, in s. 6.

APPENDIX.

The Georgian Mortmain Act

(Stat. 9 Geo. 2. c. 36).

An Act to restrain the disposition of lands, whereby the same become unalienable. [24th June, 1736.

Preamble.

Whereas Gifts or Alienations of Lands, Tenements, or Hereditaments in Mortmain are prohibited or restrained by *Magna Charta* and divers other wholesome Laws, as prejudicial to and against the common Utility, nevertheless this public Mischief has of late greatly increased, by many large and improvident Alienations or Dispositions made by languishing or dying Persons, or by other Persons, to Uses called charitable Uses, to take place after their Deaths, to the Disherison of their lawful Heirs: For Remedy whereof be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the Twenty-fourth Day of *June* which shall be in the Year of our Lord One thousand seven hundred and thirty-six no Manors, Lands, Tenements, Rents, Advowsons, or other Hereditaments, corporeal or incorporeal, whatsoever, nor any Sum or Sums of Money, Goods, Chattels, Stocks in the Public Funds, Securities for Money, or any other Personal Estate whatsoever, to be laid out or disposed of in the Purchase of any Lands, Tenements, or Hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or anyways conveyed or settled, to or upon any Person or Persons, Bodies Politic or Corporate, or otherwise, for any Estate or Interest whatsoever, or anyways charged or incumbered by any Person or Persons whatsoever, in trust or for the Benefit of any charitable Uses whatsoever, unless such Gift, Conveyance, Appointment, or Settlement of any such Lands, Tenements, or Hereditaments, Sum or Sums of Money, or Personal Estate (other than Stocks in the Public Funds), be and be made by Deed indented, sealed and delivered in the Presence of Two or more credible Witnesses Twelve Calendar Months at least before the death of such Donor or Grantor (including the Days of the Execution and Death), and be enrolled in His Majesty's High Court of Chancery within Six Calendar Months next after the Execution thereof, and unless such Stocks be transferred in the Public Books usually kept for the Transfer of Stocks, Six Calendar Months at least before the Death of such Donor or Grantor (including the Days of the Transfer and Death), and unless the same be made to take effect in possession for the charitable Use intended immediately from the making thereof, and be without any Power of Revocation, Reservation, Trust, Condition, Limitation, Clause, or Agreement whatsoever for the Benefit of the Donor or Grantor or of any Person or Persons claiming under him.

After 24th June, 1736, no Manors, Lands, &c., nor Sums of Money, Goods, &c., to be given for charitable Uses,

unless by Deed indented and executed before Two Witnesses, 12 Months before the Death of the Donor, and enrolled, &c.

The said Limitations not to extend to Purchases or Transfers made for valuable Considerations.

II. Provided always, That nothing hereinbefore mentioned relating to the sealing and Delivery of any Deed or Deeds Twelve Calendar Months at least before the death of the Grantor, or to the Transfer of any Stock Six Calendar Months before the Death of the Grantor or Person making such Transfer, shall extend or be construed to extend to any Purchase of any Estate or Interest in Lands, Tenements, or Hereditaments, or any Transfer of any Stock, to be made really and *bonâ fide* for a full and valuable Consideration actually paid at or before the making such Conveyance or Transfer, without Fraud or Collusion.

Gifts, &c., made after 24th June, 1736, otherwise than directed by this Act to be absolutely void.

III. And be it further enacted by the Authority aforesaid, That all Gifts, Grants, Conveyances, Appointments, Assurances, Transfers and Settlements whatsoever of any Lands, Tenements, or other Hereditaments, or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect any Lands, Tenements, or Hereditaments, or of any Stock, Money, Goods, Chattels, or other Personal Estate, or Securities for Money, to be laid out or disposed of in the Purchase of any Lands, Tenements, or Hereditaments, or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect the same, to or in trust for any charitable Uses whatsoever, which shall at any Time from and after the said Twenty-fourth Day of *June* One thousand seven hundred and thirty-six be made in any other Manner or Form than by this Act is directed and appointed shall be absolutely and to all Intents and Purposes null and void.

But not to prejudice the Two Universities, or the Colleges of Eton, Winchester, or Westminster.

IV. Provided always, That this Act shall not extend or be construed to extend to make void the Dispositions of any Lands, Tenements, or Hereditaments, or of any Personal Estate to be laid out in the Purchase of any Lands, Tenements or Hereditaments, which shall be made in any other Manner or Form than by this Act is directed, to or in trust for either of the Two Universities within that Part of *Great Britain* called *England*, or any of the Colleges or Houses of Learning within either of the said Universities, or to or in trust for the Colleges of *Eton*, *Winchester*, or *Westminster*, or any or either of them, for the better Support and Maintenance of the Scholars only upon the Foundations of the said Colleges of *Eton*, *Winchester*, and *Westminster*.

No College to hold more Advowsons than shall be equal to One Moiety of their Fellows, &c.

V. Provided nevertheless, and be it enacted by the Authority aforesaid, That no such College or House of Learning which doth or shall hold or enjoy so many Advowsons of Ecclesiastical Beneficies as are or shall be equal in Number to One Moiety of the Fellows or Persons usually styled or reputed as Fellows, or where there are or shall be no Fellows or Persons usually styled or reputed as Fellows, to one Moiety of the Students upon the Foundation whereof any such College or House of Learning doth or may by the present Constitution of such College or House of Learning consist, shall, from and after the Twenty-fourth day of *June* One thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding, or enjoying any other Advowsons of Ecclesistical Benefices by any Means whatsoever; the Advowsons of such Ecclesiastical Benefices as are annexed to or given for the Benefit or better Support of the Headships of any of the said Colleges or Houses of Learning not being computed in the Number of Advowsons hereby limited.

This Act not to extend to Scotland.

VI. Provided always, That nothing in this Act contained shall extend or be construed to extend to the Disposition, Grant or Settlement of any Estate Real or Personal, lying or being within that Part of *Great Britain* called *Scotland*.

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